



(24,568)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 824.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

OHIO VALLEY TIE COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF
KENTUCKY.

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THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

Pleas Before the Honorable the Court of Appeals of Kentucky, at the Capitol, in Frankfort, on November 24th., A. D. 1914.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
OHIO VALLEY TIE COMPANY, Appellee.

Appeal from the Jefferson Circuit Court, C. P. Branch #2

Be it remembered that heretofore, to-wit, on March 12, 1914, the appellant by its counsel filed in the office of the Clerk of the Court of Appeals the transcript of record and also a transcript of evidence in words and figures following, to-wit:

#70975

STATE OF KENTUCKY,
County of Jefferson:

Pleas Before the Honorable Thomas R. Gordon, Judge of the Jefferson Circuit Court, Common Pleas Branch, Second Division, at the Court House, in the City of Louisville, State and County aforesaid, on the dates hereinafter mentioned.

OHIO VALLEY TIE COMPANY, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Transcript of Record.

Be it remembered, that heretofore to-wit: on the 9th. day of December, 1911, came the Plaintiff, by counsel, and filed its Petition herein.

Said Petition is in words and figures as follows to-wit:

Jefferson Circuit Court, Common Pleas Branch, — Division.

OHIO VALLEY TIE COMPANY, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Petition.

The plaintiff, Ohio Valley Tie Company, states that it is a corporation, created and organized by and under the laws of the State

of Kentucky, with power to sue and be sued, to contract and be contracted with, and especially to manufacture, sell and deal in cross-ties and lumber. Plaintiff states that the defendant, Louisville & Nashville Railroad Company, (Hereinafter called Railroad Company), is a corporation, created and organized by and under the laws of the State of Kentucky, with power to sue and be sued, to contract and be contracted with, to operate railroads as a common carrier and to do a general business of common carrier in the transportation of merchandise and passengers for compensation.

Plaintiff states that it has built up a large and profitable business in the manufacture, purchase and sale of cross-ties used by various railroad companies and traction companies; that in so doing it has

2 expended large sums of money and acquired large quantities of machinery, saw-mills and other appliances used in the manufacture of cross-ties; some of said plants, machinery and mills are located along the lines of said Railroad Company; that plaintiff has also acquired large quantities of cross-ties and standing and cut timber along the lines of said Railroad, suitable for the manufacture of cross-ties and located conveniently for shipment on said lines of railroad; that plaintiff has built up a large and lucrative business handling approximately one million cross-ties each year, and said business yields to plaintiff a large annual profit; that plaintiff has made large contracts, whereby it agreed to sell and deliver at Louisville, Kentucky, more than 400,000 cross-ties; that plaintiff has established and possesses a high character and reputation for conducting its said business and has acquired a good-will in said business, which good-will is worth at least the sum of One Hundred Thousand Dollars.

Plaintiff further says that the defendant, which buys cross-ties in large quantities, wickedly, maliciously and unlawfully contriving and intending to injure the plaintiff and its said business, and for the purpose of preventing plaintiff from buying cross-ties at and near places along the lines of said Railroad Company, so that said Railroad Company may be rid of a competitive buyer of such cross-ties, and may be able to buy cross-ties at prices lower than it would have to pay while plaintiff remains such competitive buyer, did do and commit the acts hereinafter set forth, all within five years last past.

Defendant did charge and collect and caused to be charged and collected as compensation for hauling eighty-nine carloads of cross-ties, shipped from stations on said lines of said Railroad Company in Kentucky to Louisville, Kentucky, unlawful and excessive freight rates—that is, to say, defendant charged and collected the sum of

3 \$11,396.64 in freight charges, when in truth and in fact, the sum of \$3,269.01 was the total sum properly owing for hauling said cross-ties, according to the rates regularly fixed in the duly published intrastate tariff of said Railroad Company, and when defendant knew that any charge in excess of \$3,384.03 was unlawful and extortionate; and defendant refused and still refuses to refund the excessive sums charged and collected as aforesaid and plaintiff was compelled to bring suit and did bring suit,

which is still pending, against said Railroad Company, to recover the amount of said excessive charges.

Plaintiff states that the said sum of \$11,396.64 in freight charges was and is claimed by defendant upon the ground that the shipments upon which said charges were paid were interstate shipments, when defendant well knew and now knows that said shipments were intrastate shipments, and took the intrastate rate upon the basis of which the freight charges would have amounted to only \$3,384.03.

By the regularly published tariff of defendant, applying to shipments between points in Kentucky, which was in effect during the time of the commission of the acts hereinbefore and hereinafter mentioned, defendant published the same rate on cross-ties that it publishes on the kinds of lumber from which such cross-ties are made, while by the tariff of defendant for interstate shipments cross-ties as a general rule are put under the fifth class instead of being given the same rate as lumber, the fifth class rate being greatly in excess of the rate for hauling lumber. In many cases, the freight charges based upon said fifth class rate exceed the selling price for the cross-ties and in all other instances such charges amount to a large and unreasonable per cent of the selling price of the cross-ties. And plaintiff further states that under said interstate tariffs

which apply to cross-ties, the fifth class rate defendant has
4 collected many thousands of dollars upon interstate shipments of cross-ties in excess of what the freight charges on said shipment would have been if they had been based on the lumber rate, and defendant still holds the full amount of said excessive charges so collected.

Plaintiff further states that for more than five years last past, it has been the fixed rule of the Interstate Commerce Commission as repeatedly announced in its published official reports, and as well known to defendant, during all said time, to hold to be extortionate any interstate rate on cross-ties in excess of the rate on the kinds of lumber from which said cross-ties are made, and also to require carriers to refund to shippers upon complaint all charges on cross-ties in excess of the rate on said kinds of lumber and plaintiff further says that all interstate tariffs of defendant issued or re-issued within five years last past, which have published a higher rate on cross-ties than the rate published on the kinds of lumber from which said cross-ties are made, have been issued by defendant with the knowledge that said rates on cross-ties are extortionate and that it would in the event complaints should be filed before the Interstate Commerce Commission, complaining of said rates, be finally required to refund to persons who might be compelled to pay said extortionate rates the excess over the lumber rates, and that said tariffs have been issued and re-issued with the wilful and malicious purpose of crippling and injuring the business of plaintiff, and of other persons engaged in the business of buying cross-ties along the line of defendant's road for shipment to other points, and that said tariffs to the extent that they have published said extortionate rates, have not been published in good faith. Plaintiff further states that some of the complaints which have been filed

by plaintiff before the Interstate Commerce Commission complaining of said extortionate rates, have recently been heard before
5 said Commissioner, although still undecided, and that upon the hearing of said complaints, defendant did not attempt to defend said rates and did not introduce any testimony whatever.

But notwithstanding the fact that the Interstate Commerce Commission has many times and in all cases brought before said Commission, against the Louisville & Nashville Railroad Company, and other railroad companies, adjudged that it was and is extortionate and unconscionable for said railroad companies to charge more for hauling cross-ties in carload lots in interstate shipments than they charge for hauling lumber; and notwithstanding the fact that in all of the many cases brought before said Interstate Commerce Commission against the Louisville & Nashville Railroad Company, that Commission, where it found that said Railroad Company had collected charges for hauling cross-ties in such shipments, in excess of the regular charges for hauling lumber in similar shipments, has ordered said Railroad Company to refund to the parties paying such excessive charges the amounts of so much of such charges as were in excess of the rates for hauling lumber, the defendant has nevertheless wilfully, maliciously and persistently failed and refused and still fails and refuses to change the classification of cross-ties in its said interstate tariffs so as to take them from the fifth class and put them upon the lumber class, notwithstanding the fact that such change could be made in thirty days, or immediately with permission of the Interstate Commerce Commission. And said defendant has also made and threatens to continue to make and refuses to cease making such excessive and unlawful charges according to said fifth class rates, upon plaintiff's shipments of cross-ties from points on its lines in Kentucky to Louisville, Kentucky, whenever the cross-ties have been or may be consigned to the Big Four Railroad Company or to the Pennsylvania Company or to the plaintiff
6 in case of either of said Companies or in care of the Pennsylvania Terminal Railroad Company or to the plaintiff, Pennsylvania Terminal Railway Company Delivery, unless plaintiff or the said company in whose care said cars may be consigned will agree to cause said cars to be promptly unloaded and returned to defendant.

And plaintiff further states that it has contracts with the said Big Four Railroad Company and the Pennsylvania Company for the sale to them of large numbers of cross-ties to be delivered to them at Louisville, Kentucky, and that the tracks of defendant, the Big Four Railroad Company are physically connected with the tracks of defendant as are also the tracks of the Pennsylvania Terminal Railway Company upon whose tracks plaintiff is required to deliver to the Pennsylvania Company the cross-ties which the said Pennsylvania Company has purchased from plaintiff.

It has been continuously, during all times herein mentioned, and still is, the uniform custom of said Railroad Company when lumber and other goods, except live stock, are shipped in carload lots over its lines to Louisville, Kentucky, consigned to individuals, firms or

corporations including railroad corporations, or in care of such railroad companies having tracks physically connected in Louisville with tracks of said Louisville & Nashville Railroad Company, or having tracks physically connected in Louisville with the tracks of other railroad companies—such other railroad companies having also tracks physically connected in Louisville with the tracks of the Louisville & Nashville Railroad Company—to make deliveries of lumber and other goods (except live stock) when shipped in carload lots delivering said cars, loaded as aforesaid, upon the tracks so connecting with the tracks of said Louisville & Nashville Railroad Company and the Louisville & Nashville Railroad Company, has, within the last three months, uniformly observed and followed that custom in making deliveries of all carload lots of cross-ties and lumber hauled for plaintiff over its lines from points in Kentucky to Louisville, Kentucky, consigned as aforesaid; notwithstanding said custom, which said Railroad Company has long observed and followed and still observes and follows, where the shipments were made for parties other than plaintiff, the defendant during said last three months has failed and refused, and still fails and refuses and threatens to continue to fail to refuse to deliver to and upon such connecting tracks any such loaded cars shipped to Louisville by or for plaintiff and consigned as aforesaid; and defendant has demanded that plaintiff shall either pay the said interstate freight carrying charges for fifth class freight, when said Railroad Company will deliver the loaded cars upon the said connecting tracks, or in the event plaintiff elects to pay the intrastate rate, shall unload such cars of cross-ties upon the tracks of said Railroad Company, and haul away the cross-ties from the premises of said Railroad Company. Such hauling could only be done in wagons and the cost of such unloading and hauling away would be considerable and would greatly reduce the profit which plaintiff could reap in buying and selling the cross-ties. Defendant has also required and threatens to continue to require of the Pennsylvania Terminal Railway Company, as a condition for placing upon the tracks of the Pennsylvania Terminal Railway Company, connecting with the tracks of defendant, any carloads of ties shipped and caused to be shipped by plaintiff from points on defendant's lines in Kentucky to Louisville, Kentucky, consigned to the Pennsylvania Terminal Railway Company, consigned to plaintiff, in care of the Pennsylvania Company, that the freight be paid upon the basis of the classification made by defendant's said interstate tariff or that said Pennsylvania Terminal Railway Company shall transfer said ties from the cars in which they were originally shipped to other cars upon the track of the Pennsylvania Railway and shall thereupon return said original cars to defendant, and plaintiff has been compelled to have many of said cars unloaded and their contents transferred to other cars at heavy expense, amounting to about \$100 per car, and will be compelled to have many others of said cars unloaded and their contents so transferred at a like expense; whereas, in cases of similar shipments by parties other

than plaintiff, of lumber and other commodities, defendant imposes no such requirements but allows the consignees to pay the freight charges to Louisville and then to reconsign the original loaded cars to other points outside of Kentucky. After defendant refused to place cars loaded with cross-ties upon the tracks of said other railroad companies except upon the payment of said excessive interstate fifth class rates, or upon condition that said cars be promptly unloaded and returned to defendant, the plaintiff offered to cause cars, belonging to other railroad companies having their tracks physically connected with the tracks of the defendant at Louisville, to be delivered to the defendant upon its tracks, said cars, to be used in hauling the ties which the plaintiff had agreed to sell to such railroad companies thus furnishing the cars and said cars, when loaded and hauled to Louisville, to be switched by the defendant to the connecting tracks of such railroad companies who had furnished such cars, without requiring the ties to be transferred from such cars to other cars; but the defendant refused to accept any such cars for the purpose aforesaid, notwithstanding the fact that in Cincinnati, Ohio, and other places outside of Kentucky, the defendant does accept cars of other companies offered in the same way and uses such cars in hauling ties of the plaintiff and others from various points in Kentucky and elsewhere to Cincinnati, and such other places, and when such cars reach Cincinnati or such other places, the defendant switches the same, thus loaded with ties, to and upon the connecting tracks of the other railroad companies who had furnished such cars, without requiring the ties to be transferred from such cars to other cars.

Plaintiff further states that defendant, having wilfully and maliciously refused to deliver upon the tracks of the Pennsylvania Company a large number of cars loaded with cross-ties which were consigned to plaintiff at Louisville, Kentucky, in care of the Pennsylvania Company, except upon payment of the interstate rate, which greatly exceeded the intrastate rate, plaintiff on September 14th, 1911, brought an action numbered 68953, against the defendant, in the Jefferson Circuit Court, and in said action such proceedings were had that on September 26th., 1911, an order of injunction was entered enjoining and ordering the defendant, among other things, to deliver immediately upon their arrival at Louisville, Kentucky, to the Pennsylvania Company, upon the payment of freight charges based on the intrastate rates, and on the tracks controlled by the Pennsylvania Terminal Railway Company in Louisville, Kentucky, all cars of cross-ties, which the defendant may receive, consigned to this plaintiff, care of Pennsylvania Company. Said order of injunction now is, and has been at all times since it was entered, in full force and effect. Soon after said order of injunction was granted, to wit: on September 29th., 1911, the defendant issued a circular marked "N. S. Circular 3045" addressed to all of defendant's agents in Kentucky and directing said agents not to accept for shipment to Louisville, Ky., any cross-ties consigned to plaintiff, care of Pennsylvania Company, or for "Pennsylvania De-

es"; or consigned to plaintiff care of C. C. C. & St. L. Ry. or Four Road, or calling for "C. C. C. & St. L. Ry. Deliveries", or "Big Four Deliveries"; or consigned to plaintiff care of Monon or the C. I. & L. Ry. or calling for "Monon Deliveries" or "C. I. & L. Deliveries"; or consigned to plaintiff care of B. & O. S. W. R. R. or calling for "B. & O. S. W. R. R. Deliveries". circular further directed that carload lots of ties offered for shipment by plaintiff could be accepted for shipment only when consigned to plaintiff, to Pennsylvania Company, P. C. C. & St. L. Ry. or Big Four, Monon or C. I. & L. Ry. or to B. & O. S. W. R. R. or by the P. C. C. & St. L. Ry. the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, by the C. C. C. & St. L. Ry. the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, by the C. C. C. & St. L. Ry. the Chicago, Indianapolis & Louisville Railway Company, and by the B. & O. S. W. R. R. the Baltimore & Ohio Southern Railway Company. Said directions contained in said circular were sent to defendant's agents in Kentucky, and said directions have been and still are following by said agents and by defendant. Plaintiff further says that it is informed and therefore states that prior to the issuance of said circular the defendant had given orders to its various agents along its lines in Kentucky, to place no cars and receive no cross-ties from plaintiff for shipment in carload lots at other points in Kentucky to Louisville, Kentucky, except in cases where the intrastate and interstate hauling charges are, according to said tariff, the same from such other points to Louisville, Kentucky, the interstate rate being the same as the intrastate rate at some points, but said orders seem to have been abrogated by said circular marked "N. S. Circular 3045".

Plaintiff further states that after the Jefferson Circuit Court had granted said injunction, which was granted upon the ground that shipments of cross-ties were intrastate shipments, the plaintiff demanded that the freight charges collected by defendant upon said 89 cars of cross-ties in excess of what the freight charges thereon would have been if based on the intrastate rate be repaid to plaintiff, and defendant refused to refund said excess although said 89 cars were shipped from points in Kentucky to Louisville, Ky., as were said cars as to which said injunction was granted and were consigned in the same way that said cars as to which said injunction was granted were consigned and defendant knew when it again refused to grant said demand, that said cars of cross-ties were intrastate shipments, and took only the intrastate rate, and defendant refused to refund said excess and now does the same with the malicious purpose of harassing plaintiff and injuring its business.

Plaintiff also states that very recently persons desiring to ship cross-ties to the Louisville Railway Company at Louisville, Ky., applied to defendant to furnish empty cars to them on switches connecting with defendant's line in Bullitt County, Kentucky, said cars to be loaded with cross-ties to be shipped to said Company at Louisville, Ky.; whereupon defendant, wilfully and maliciously and further pursuance of its said design and purpose to injure plain-

tiff and its business, did inform said persons that it would not furnish said cars unless and until they would give to defendant the assurance that said cross-ties were not intended for plaintiff. Thereupon said persons assured defendant that said cross-ties were intended for the Louisville Railway Company, and not for the plaintiff and the defendant then promptly furnished and placed said cars on said switches and the cars were loaded by said persons and were hauled by the defendant to Louisville, Ky., that being the place to which they were consigned, and said cars were delivered by defendant to the Louisville Railway Company.

Plaintiff further states that defendant, by refusing to furnish said cars unless it should be assured that they were not intended for plaintiff, maliciously intended to make the impression upon the public that plaintiff could not get cars for the shipment of cross-ties, and that defendant after maliciously seeking by that means and other means to make the impression upon the public that plaintiff would be compelled to retire from the business of buying cross-ties on defendant's line in further pursuance of its said design and purpose to injure plaintiff and its said business wilfully and maliciously sought out numerous persons from whom plaintiff was and is in the habit of buying cross-ties, and tried to induce said persons to sell said cross-ties to it instead of to plaintiff.

Plaintiff further states that after defendant refused to deliver cars loaded with cross-ties upon the tracks of other companies except upon the payment of the interstate rate or upon condition that said cars be unloaded and promptly returned to defendant, plaintiff, in order to avoid the annoyance to its customers of having to transfer said cross-ties to other cars at Louisville, Ky., caused a large number of cars loaded with cross-ties which would otherwise have been delivered at Louisville, Ky., to be shipped from East Bernstadt, Ky., to Cincinnati, Ohio, and to be delivered to purchasers there instead of at Louisville, Kentucky, although the rate to Cincinnati, O., was one cent per hundred pounds in excess of the rate to Louisville, Ky., and defendant by its own malicious action in requiring cross-ties shipped by plaintiff over its line for delivery, to other railroad companies to be transferred to other cars at Louisville, Ky., was thus able to and did charge and collect a rate of

13 one cent per hundred pounds in excess of what it would otherwise have been able to collect, said excess charge amounting to about \$800.00.

Plaintiff further states that while it is compelled to bear the expense of transferring said cross-ties to other cars at Louisville, Ky., yet the railroad companies which purchase said ties from plaintiff are compelled to have said transfer made and are annoyed and inconvenienced thereby, and plaintiff states that the said malicious action of defendant in requiring said transfer to be made tends to and was intended to drive away plaintiff's customers and to cause them to go to other markets for their ties where they are saved the annoyance of making such transfers, and that if said malicious practice of defendant is continued plaintiff's customers will either buy the ties they need from persons other than plaintiff or plaintiff

will be compelled to deliver ties to *his* customers at other points than Louisville, and will be compelled to pay greater freight charges to such points of delivery than *he* is required to pay to Louisville.

Plaintiff further says that the defendant pursuant to its said malicious purpose to injure plaintiff's business has wilfully and maliciously delayed, and persists in delaying, to furnish cars to plaintiff, after request therefor, for the loading and shipment of cross-ties placed on defendant's right of way for shipment, and plaintiff further states that by reason of said delays in furnishing cars said cross-ties have been injured by exposure to the weather and have deteriorated in value, and plaintiff has been unable by reason of said delay to comply with *his* contracts to deliver said ties to purchasers thereof at the times agreed upon, thus causing annoyance to plaintiff's customers and postponing the payment for said cross-ties to the extent of said periods of delay. And plaintiff further

14 states that defendant wilfully and maliciously demands and persists in demanding, before furnishing cars to plaintiff upon request for shipment of cross-ties, that plaintiff shall disclose to defendant the places and persons to which and to whom said cars when loaded are to be consigned, although defendant does furnish cars for shipment of other commodities than cross-ties without requiring the shipper to name the place or person to which or to whom the cars when loaded are to be consigned, and does furnish cars to other shippers for the shipment of cross-ties without making such demand except in cases where the defendant suspects that the cars are intended to be consigned to plaintiff or for its benefit.

Plaintiff further states that said various orders issued by defendant from time to time, with reference to the handling of plaintiff's shipments of cross-ties on defendant's line, which orders were issued with the malicious purpose of harassing and annoying plaintiff and injuring its business, have made it necessary for plaintiff to give to the transportation and delivery of said shipments much valuable time which, but for said malicious action of defendant, plaintiff would not have been compelled to give to said transportation and delivery, and the prosecution before the Interstate Commerce Commission and before the Courts of the various proceedings which plaintiff has been compelled by reason of defendant's said malicious acts to institute as hereinbefore alleged, have also required much of plaintiff's time which would otherwise have been devoted and ought to have been devoted to other business of plaintiff, and that the time which plaintiff had thus been compelled to devote to the transportation and delivery of said shipments and to said proceedings, and has thus lost from other business, was of the value of at least \$2,000.00.

15 Plaintiff further states that by reason of defendant's said malicious and unconscionable action in publishing rates on cross-ties which it knew to be extortionate and which it did not intend to defend in the event that they should be attacked, and in refusing to change said classification, plaintiff has been compelled to employ attorneys to file complaints before the Interstate Commerce Commission to obtain reparation on account of said extortionate charges, and plaintiff will be compelled to pay reasonable fees to said

attorneys in the prosecution of said complaints, which are now pending, and plaintiff will also be compelled to incur reasonable attorney's fees in the prosecution of other complaints which it will be compelled to hereafter file before the Interstate Commerce Commission to recover the excessive charges assessed and collected upon other shipments under said tariffs, and that all said reasonable attorneys' fees will aggregate \$2500.00. Plaintiff further states that it has also been compelled to pay reasonable attorneys' fees amounting to \$600 in the said suit in the Jefferson Circuit Court in which it obtained a mandatory injunction requiring defendant to deliver to the Pennsylvania Company upon the tracks of the Pennsylvania Terminal Railway Company upon payment of the intrastate rate the cars loaded with cross-ties shipped from points in Kentucky and consigned to plaintiff at Louisville, Kentucky, in care of the Pennsylvania Company, which cars defendant had refused to so deliver except upon payment of the excessive interstate rate, and which refusal was made by defendant pursuant to its said wilful and malicious purpose to injure plaintiff's business. Plaintiff further states that it was also compelled to employ attorneys to bring the suit hereinbefore referred to, for the recovery of charges collected by defendant upon eighty-nine carloads of cross-ties in excess of the published intrastate rate on said ties and that it will be compelled to

16 pay to said attorneys reasonable fees for bringing and prosecuting said suit, amounting to at least \$—. Plaintiff further states that defendant when it published said extortionate interstate rates on cross-ties, and when it collected said excessive rates on intrastate shipments of cross-ties contemplated that plaintiff and other persons engaged in buying cross-ties along its line would have to pay reasonable attorneys' fees in order to obtain reparation, and defendant maliciously intended by its said action in publishing said extortionate interstate rates and in collecting said excessive intrastate rates to impose upon plaintiff the burden of paying such attorneys' fees, and also maliciously intended by imposing such burdens and other burdens upon plaintiff to so harass and annoy plaintiff and other dealers in cross-ties, and so tie up the capital of plaintiff and said other dealers as to discourage them and drive them from the market, and thus leave defendant as the only buyer of cross-ties on its line. Plaintiff further states that while defendant knew that plaintiff would be able to finally recover the said freight charges collected by defendant in excess of reasonable charges the defendant also knew that said excessive charges could and would be withheld by defendant for a long period of time, and that plaintiff would be deprived of the use in its business of that much of its capital, and that its business would thus be hampered and crippled. And plaintiff further states that by reason of said malicious acts of defendant a substantial part of plaintiff's capital is now wrongfully held by defendant, and plaintiff's business, as defendant maliciously intended that it should be, has been seriously crippled by defendant's said malicious acts, and plaintiff by reason of said acts has been compelled to borrow large sums of money which but for said acts it would not have been compelled to borrow, and to pay large sums as interest on

17 said borrowed capital, which but for said acts it would not have been compelled to pay, and plaintiff by reason of defendant's said malicious acts has been deprived of the use not only of the freight charges paid by plaintiff, in excess of what said charges would have been if based upon the lumber rate, but has also been deprived of the use of said money paid as interest.

Plaintiff further states that by reason of defendant's said malicious acts and the said tying up of plaintiff's capital, plaintiff's credit has been greatly impaired, and that plaintiff by reason thereof, and the uncertainty growing out of defendant's persistent and malicious attempt to injure plaintiff's business was compelled to instruct its buyers to cease buying ties along defendant's line, and that plaintiff has thereby lost the opportunity to buy many ties, and has lost large profits which it would have made on said ties, and that said loss has resulted directly from defendant's said malicious acts. And by reason of all said acts of defendant, the plaintiff was and is greatly delayed in the performance of its said contracts for the sale and delivery of cross-ties, and plaintiff has thereby been and is greatly harassed and annoyed and injured in its said business, and subjected to great expense, and loss of time, and has been and is damaged in the sum of one hundred thousand dollars.

Wherefore, plaintiff prays judgment against defendant for the sum of one hundred thousand dollars, and for all proper and general relief.

HINES & NORMAN,
BODLEY & BASKIN,
Attorneys for Defendant.

C. P. Bush states that he is President and Chief Officer of the Ohio Valley Tie Company, and that the statements contained
18 herein are true, to the best of his knowledge and belief.
C. P. BUSH.

Subscribed and sworn to before me by C. P. Bush, this 9th day of December, 1911. My commission expires January 24th, 1914.
J. V. NORMAN,
N. P. J. C., Ky.

Thereupon the Clerk issued Summons and 1 Copy, which Summons is as follows to-wit:

THE COMMONWEALTH OF KENTUCKY:

Jefferson Circuit Court.

To the Sheriff of Jefferson County, Greeting:

We command you to summon Louisville & Nashville Railroad Company, to answer a petition filed against it in our Jefferson Circuit Court by Ohio Valley Tie Company, and warn it that upon failure to answer within twenty days after service thereof, if in Jefferson County, or within thirty days if elsewhere in the State,

judgment may be rendered by default, or answer compelled, or proof taken at petitioner's option; and make due return of this summons within sixty days from the date hereof.

Witness, Louis-Summers, Clerk of said Court, this 9th day of December, 1911.

LOUIS SUMMERS, *Clerk*,
By GEO. P. BUTLER, *D. C.*

Said foregoing Summons bears the following Sheriff's return on the back thereof, to-wit:

19 Came to hand Dec. 11th, 1911, at 12 M.

Executed Dec. 13, 1911, on the Louisville & Nashville Railroad Company, by delivering a copy of the within summons to M. H. Smith, President of said company, he being the chief officer found in this county at this time.

A. M. EMLER, *S. J. C.*,
By CHAS. SCHUFF, *D. S.*

At a Court held on the 6th day of January, 1912.

This action was set at rules by the plaintiff on the 2nd inst.

Upon motion of the plaintiff by counsel, it is ordered that this action be and it is remanded.

At a Court held on the 13th day of January, 1912.

This action was set at rules by the plaintiff on the 8th inst.

Came the defendant by counsel, and moved the Court on a written motion filed, to require the plaintiff to paragraph its petition herein, to which the plaintiff objects.

It is ordered that the said motion be and is assigned to January 19th, 1912, at 9 A. M. for hearing.

Said Written Motion to Paragraph filed on the 13th day of January, 1912, is as follows, to-wit:

Jefferson Circuit Court, Common Pleas Branch, — Division.

OHIO VALLEY TIE COMPANY, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Motion.

20 Defendant moves the Court to require plaintiff to paragraph its petition herein, and to state in separate paragraphs the facts constituting its various alleged causes of action joined in said petition, and among others, to state separately in separate paragraphs the facts constituting its alleged causes of action (1) on account of defendant's collection of excessive rates, (2) on account of defendant's alleged maintenance of an excessive interstate rate in its tariffs, (3) on account of defendant's alleged improper refusal to deliver car loads of ties on connecting tracks, (4) on account of de

defendant's alleged delay in furnishing cars, (5) on account of loss of plaintiff's time and personal service, and (6) on account of alleged attorneys' fees improperly required to be paid, and (7) any other facts embraced in said petition supposed by plaintiff to constitute any other causes of action in its favor against defendant.

BRUCE & BULLITT, *For Def't.*

At a Court held on the 19th day of January, 1912.

This action having been heard upon the defendant's motion to require the plaintiff to paragraph its petition herein, and the Court not being fully advised, it is ordered that the said motion be and it is submitted.

At a Court held on the 10th day of February, 1912.

The Court being advised, endorsed an opinion on the wrappers herein, which is ordered to be and is filed and made a part of the record.

Pursuant to said opinion, it is ordered and adjudged that the defendant's motion to require plaintiff to paragraph petition, be and it is overruled, to which the defendant excepts.

21 Said Written Opinion endorsed on the Wrapper is as follows to-wit:

1912, Feb'y 10.—The Pl'tff alleges that it has built up a large & lucrative business in buying & selling railroad cross-ties handling approximately a million cross-ties annually. That the defendant buys large quantities of ties in the territory in which pl'tff operates, that for the unlawful purpose of injury & destroying pl'tff's business & in order to be rid of pl'tff as a competitive buyer, has maliciously & unlawfully (a) charged & required pl'tff to pay greatly excessive freight rates (b) that it has carried extortionate rates in its interstate tariffs, knowing them to be extortionate, & in violation of the tariff fixed & announced by the Interstate Commerce Commission, (c) that it has wrongfully refused to switch cars to the tracks of other railroad tracks, for pl'tff, thus discriminating against pl'tff (d) That it has wrongfully & unreasonably failed & refused to furnish cars to pl'tff reasonably & has unreasonably delayed pl'tff in its shipments, by delay in furnishing cars; (e) that it has wrongfully & unlawfully refused to furnish cars to persons who desired to ship cross-ties unless & until such persons would & did assure def't that the ties were not to be shipped to pl'tff. There are further allegations of other & additional alleged wrongful & illegal acts, all alleged to have been done maliciously for the purpose of injury & destroying pl'tff's business, & it is alleged that by all these things pl'tff's business has been injured & impaired to the great damage & loss to pl'tff for which it sues.

The case is before the Court on def't's mo. to require Pl'tff to set out the several alleged wrongful acts in separate paragraphs. Under the Code, separate causes of action must be set out in separate paragraphs, so the inquiry is, are the various alleged wrongful acts separate causes of action?

22 In Cyc. Vol. 31 page 119, it is said "and when a single continuous purpose runs through an entire transaction made up of various acts, each of which might alone constitute a cause of action, it is proper to set up all the facts in one count as a single cause of action."

In *Boyce v. Odell & Co.*, 107 Fed. 58, the Court says: "a series of illegal acts of discrimination by a carrier against a shipper constitute only one cause of action (citing *Langon v. Rwy. Co.*, 19 Ky. Sub. 255, and further in the same case, "a series of wrongful acts all arriving at a single result and contributing to the injury complained of, to-wit: the destruction of one's business credit & reputation may be counted in collectively as producing the result in a single action on the case (citing *Oliver v. Perkins*, 92 Mich. 304). See also *Chicago & N. W. R. R. Co. vs. Walcutt*, 141 Ind., 267. Separate distinct acts of negligence, causing death may be joined in one paragraph, *Fagg's Admr. v. L. & N. R. R. Co.*, 111 Ky. 30.

It seems to the Court that in this case, the alleged wrongful acts do not each constitute a different cause of action, but that all together constitute the cause which it is alleged produced the injury & damage complained of.

Def'ts mo. to require pl'tf. to paragraph pet. is overruled. Except for def't.

GORDON, J.

At a court held on the 17th. day of February, 1912.

This action was set at rules by the plaintiff on the 12th. inst.

Came the defendant, by counsel, and moved the Court on a written motion filed, to strike from the petition herein, to which the plaintiff objects.

The Court being advised, it is ordered that the said motion be granted and it is overruled, to which the defendant excepts.

23 Came the defendant by counsel, and filed a special demurrer to the petition herein.

It is ordered that the said demurrer be and is assigned to February 23rd., 1912, at 9 A. M. for argument.

Said Written Motion to Strike from the Petition, filed on the 17th. day of February, 1912, is as follows, to-wit:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

OHIO VALLEY TIE COMPANY, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Motion to Strike Out.

Defendant moves the Court to strike from the petition the following portions thereof, because they severally state no cause of action and are irrelevant and surplusage, being the portions of said petition respectively embraced in the following quotations, to-wit:

1. "It has been continuously, during all the times herein mentioned and still is, the uniform custom of said Railroad Company when lumber and other goods, except live stock, are shipped in car load lots over its lines to Louisville, Kentucky, consigned to individuals, firms, or corporations, including railroad corporations, or in care of such railroad companies having tracks physically connected in Louisville with the tracks of said Louisville & Nashville Railroad Company, or having tracks physically connected in Louisville, with the tracks of other railroad companies—such other railroad companies having also tracks physically connected in Louisville with the tracks of the Louisville and Nashville Railroad Company—to make deliveries of lumber and other goods, (except live stock) when shipped in carload lots by delivering said cars,

24 loaded as aforesaid, upon the tracks so connecting with the tracks of said Louisville & Nashville Railroad Company; and the Louisville & Nashville Railroad Company, has, until within the last three months, uniformly observed and followed that custom in making deliveries of all carload lots of cross ties and lumber hauled for plaintiff over its lines from points in Kentucky to Louisville, Kentucky, consigned as aforesaid; but notwithstanding said custom, which said Railroad Company has during said times observed and followed, and still observes and follows, where the shipments were made for parties other than plaintiff, the defendant during said last three months has failed and refused, and still fails and refuses and threatens to continue to fail and refuse to deliver to and upon such connecting tracks any such loaded cars shipped to Louisville by or for plaintiff and consigned as aforesaid; and defendant has demanded that plaintiff shall either pay the said interstate freight carrying charges for fifth class freight, when said Railroad Company will deliver the loaded cars upon the aforesaid connecting tracks, or in the event plaintiff elects to pay only the interstate rate shall unload such cars of cross ties upon the tracks of said Railroad Company and haul away the cross ties from the premises of said Railroad Company. Such hauling away could only be done in wagons and the cost of such unloading and hauling away would be considered and would greatly reduce any profit which plaintiff could reap in buying and selling the cross ties. Defendant has also required and threatens to continue to require of the Pennsylvania Terminal Railway Company, as a condition for placing upon the tracks of the Pennsylvania Terminal Railway Company, connecting with the tracks of defendant, any car loads of ties shipped and

25 caused to be shipped by plaintiff from points on defendant's lines in Kentucky to Louisville, Kentucky, consigned to the Pennsylvania Terminal Railway Company or consigned to plaintiff, in case of the Pennsylvania Company, that the freight be paid upon the basis of the classification made by defendant's said interstate tariff or that said Pennsylvania Terminal Railway Company shall transfer said ties from the cars in which they were originally shipped to other cars upon the tracks of the Pennsylvania Railway and shall thereupon return said original cars to defendant,

and plaintiff has been compelled to have many of said cars unloaded and their contents transferred to other cars at heavy expense, amounting to about \$5.00 per car, and will be compelled to have many others of said cars unloaded, and their contents so transferred at a like expense; whereas, in cases of similar shipments by parties other than plaintiff of lumber and other commodities, defendant imposes no such requirements but allows the consignees to pay freight charges to Louisville and to re-consign the original load to cars to other points outside of Kentucky."

2. "After defendant refused to place cars loaded with cross ties upon the tracks of said other railroad companies, except upon payment of said excessive interstate fifth class rates, or upon condition that said cars be promptly unloaded and returned to defendant, the plaintiff offered to cause cars, belonging to other railroad companies having their tracks physically connected with the tracks of the defendant at Louisville, to be delivered to the defendant upon its tracks, said cars to be used in hauling the ties which the plaintiff had agreed to sell to such railroad companies thus furnishing the cars and said cars, when unloaded and hauled to Louisville, to be switched by the defendant to the connecting tracks of such other railroad companies who had furnished such cars, without requiring

the ties to be transferred from such cars to other cars;

26 the defendant refused to accept any such cars for the purpose aforesaid, notwithstanding the fact that in Cincinnati, Ohio, and other places outside of Kentucky, the defendant does accept cars of other railroad companies offered in the same way and uses such cars in hauling ties of the plaintiff and others from various points in Kentucky and elsewhere to Cincinnati, and from other places, and when such cars reach Cincinnati, or such other places the defendant switches the same, thus loaded with ties, and upon the connecting tracks of the other railroad companies who had furnished such cars, without requiring the ties to be transferred from such cars to other cars."

3. "Plaintiff further states that defendant having wilfully and maliciously refused to deliver upon the tracks of the Pennsylvania Company, a large number of cars loaded with cross ties which were consigned to plaintiff at Louisville, Kentucky, in care of the Pennsylvania Company except upon payment of the interstate rates which greatly exceeded the intrastate rate, plaintiff, on September 14, 1911, brought an action, numbered 68956, against the defendant in the Jefferson Circuit Court, and in said action such proceedings were had that on September 26th, 1911, an order of injunction was entered enjoining and ordering the defendant, among other things, to deliver immediately upon their arrival at Louisville, Kentucky, to the Pennsylvania Company upon the payment of freight charges based on the intrastate rates, and on the tracks controlled by the Pennsylvania Terminal Railway Company in Louisville, Kentucky, all cars of cross ties, which the defendant may receive, consigned to this plaintiff, care of Pennsylvania Company. Said order of

junction now is, and has been at all times since it was entered, in full force and effect.

27 "Soon after said order of injunction was granted, to-wit: on September 29th., 1911, the defendant issued a circular marked 'N. S. Circular 3045' addressed to all of defendant's agents in Kentucky and directing said agents not to accept for shipment to Louisville, Ky., any cross ties consigned to plaintiff care of Pennsylvania Company, or for 'Pennsylvania Deliveries', or consigned to plaintiff care of C. C. C. & St. L. Ry. or Big Four Road, or calling for 'C. C. C. & St. L. Ry. Deliveries', or 'Big Four Deliveries', or consigned to plaintiff, care of Monon or the C. I. & L. Ry. or calling for 'Monon Deliveries' or 'C. I. & L. Deliveries'; or consigned to plaintiff care of B. & O. S. W. R. R., or calling for 'B. & O. S. W. R. R. Deliveries'. Said circular further directed that carload lots of ties offered for shipment by plaintiff could be accepted for shipment only when consigned to plaintiff, to Pennsylvania Company, P. C. C. & St. L. Ry. or Big Four, Monon, or C. I. & L. Ry., or to B. and O. S. W. R. R., meaning by the P. C. C. & St. L. Ry., the Pittsburgh, Cincinnati, Chicago, & St. Louis Railway Company, by the C. C. C. & St. L. Ry., the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, by the C. I. & L. Ry., the Chicago, Indianapolis & Louisville Railway Company, and by the B. & O. S. W. R. R., the Baltimore & Ohio Southwestern Railroad Company. Said directions contained in said circular were sent to defendant's agents in Kentucky, and said directions have been and still are followed by said agents and by defendant.

"Plaintiff further says that it is informed and therefore states that prior to the issuance of said circular the defendant had given orders to its various agents along its line in Kentucky, to place no cars and to receive no cross ties from plaintiff for shipment in carload lots from other points in Kentucky to Louisville, Kentucky, except in cases where the intrastate and interstate hauling charges are, according to said tariff, the same from such other points to

28 Louisville, Kentucky, the interstate rate being the same as the intrastate rate from some points, but said orders seem to have been abrogated by said circular marked 'N. S. Circular 3045'.

4. "Plaintiff also states that very recently persons desiring to ship cross ties to the Louisville Railway Company at Louisville, Kentucky, applied to defendant to furnish empty cars to them on switches connecting with defendant's line in Bullitt County, Kentucky, said cars to be loaded with cross ties to be shipped to said Company at Louisville, Ky., whereupon defendant, wilfully and maliciously and in further pursuance of its said design and purpose to injure plaintiff and its business, did inform said persons that it would not furnish said cars unless and until they would give to defendant the assurance that said cross ties were not intended for plaintiff. Thereupon said persons assured defendant that said cross ties were intended for the Louisville Railway Company and not for the plaintiff, and the defendant then promptly furnished and

placed said cars on said switches and the cars were loaded by said persons and were hauled by the defendant to Louisville, Ky., that being the place to which they were consigned, and said cars were delivered by defendant to the Louisville Railway Company.

"Plaintiff further states that defendant, by refusing to furnish said cars unless it should be assured that they were not intended for plaintiff, maliciously intended to make the impression upon the public that plaintiff could not get cars for the shipment of cross ties, and that defendant after maliciously seeking by that means and other means to make the impression upon the public that plaintiff would be compelled to retire from the business of buying cross ties on defendant's line in further pursuance of its said designs and purpose to injure plaintiff and its said business wilfully and maliciously sought out numerous persons from whom plaintiff was and is in the habit of buying cross ties and tried to induce

29 said persons to sell said cross ties to it instead of to plaintiff".

5. "Plaintiff further states that after the defendant refused to deliver cars loaded with cross ties upon the tracks of other companies except upon the payment of the interstate rate or upon condition that said cars be unloaded and promptly returned to defendant, plaintiff, in order to avoid the annoyance to its customers of having to transfer said cross ties to other cars at Louisville, Ky., caused a large number of cars loaded with cross ties which would otherwise have been delivered at Louisville, Ky., to be shipped from East Bernstadt, Ky., to Cincinnati, Ohio, and to be delivered to purchasers there instead of at Louisville, Kentucky, although the rate to Cincinnati, O., was one cent per hundred pounds in excess of the rate to Louisville, Ky., and defendant by its own malicious action in requiring cross ties shipped by plaintiff over its line for delivery to other railroad companies to be transferred to other cars at Louisville, Ky., was thus able to and did charge and collect a rate of one cent per hundred pounds, in excess of what it would otherwise have been able to collect, said excess charges amounting to about \$800.00".

6. "Plaintiff further states that while it is compelled to bear the expense of transferring said cross ties to other cars at Louisville, Ky., yet the railroad companies which purchase said ties from plaintiff are compelled to have said transfer made and are annoyed and inconvenienced thereby, and plaintiff states that the said malicious action of defendant in requiring said transfer to be made tends to and was intended to drive away plaintiff's customers and to

30 cause them to go to other markets for their ties where they are saved the annoyance of making such transfers, and that if said malicious practice of defendant is continued plaintiff's customers will either buy the ties they need from persons other than plaintiff or plaintiff will be compelled to deliver ties to his customers at other points than Louisville, and will be compelled to pay greater freight charges to such points of delivery than he is required to pay to Louisville."

7. "And plaintiff further states that defendant wilfully and mali-

usly demands and persists in demanding, before furnishing cars plaintiff upon request for shipment of cross ties, that plaintiff shall close to defendant the places and persons to which and to whom d cars when loaded are to be consigned, although defendant does nish cars for shipment of other commodities than cross ties with- t requiring the shipper to name the place or person to which or to om the cars when loaded are to be consigned, and does furnish s to other shippers for the shipment of cross ties without making h demand except in cases where the defendant suspects that the s are intended to be consigned to plaintiff or for its benefit."

8. "Plaintiff further states that by reason of defendant's said mali- ous and unconscionable action in publishing rates on crosd ties ich it knew to be extortionate and which it did not intend to fend in the event they should be attacked, and in refusing to change said classification, plaintiff has been compelled to employ attorneys to file complaints before the Interstate Com- merce Commission to obtain reparation on account of said ortionate charges, and plaintiff will be compelled to pay reason- le fees to said attorneys in the prosecution of said complaints, ich are now pending, and plaintiff will also be compelled to incur ersonable attorneys' fees in the prosecution of other complaints ich it will be compelled to hereafter file before the Interstate Com- merce Commission to recover the excessive charges assessed and col- lected upon other shipments under said tariffs, and that all said rea- sonable attorneys' fees will aggregate \$2,500.00. Plaintiff further tes that it has also been compelled to pay reasonable attorneys' es amounting to \$600 in the said suit in the Jefferson Circuit Court hich it obtained a mandatory injunction requiring defendant to deliver to the Pennsylvania Company upon the tracks of the Penn- sylvania Terminal Railway Company upon payment of the intra- state rate the cars loaded with cross ties shipped from points in entucky, and consigned to plaintiff at Louisville, Kentucky, in care the Pennsylvania Company, which cars defendant had refused to deliver except upon payment of the excessive interstate rate, and hich refusal was made by defendant pursuant to its said wilful and alicious purpose to injure plaintiff's business.

"Plaintiff further states that it was also compelled to employ attor- nys to bring the suit hereinbefore referred to for the recovery of charges collected by defendant upon eighty-nine carloads of cross- es in excess of the published intrastate rate on said ties and that will be compelled to pay to said attorneys reasonable fees for bringing and prosecuting said suit amounting to at least \$—.

2 "Plaintiff further states that defendant (when it pub- lished said extortionate interstate rates on cross ties and) hen it collected said excessive rate on intrastate shipments of cross es contemplated that plaintiff and other persons engaged in buy- ing cross ties along its line would have to pay reasonable attorneys' es in order to obtain reparation, and defendant maliciously in- duced by its said action (in publishing said extortionate interstate

rates and), in collecting said excessive intrastate rates to impose upon plaintiff the burden of paying such attorneys' fees."

9. "Plaintiff further states that while defendant knew that plaintiff would be able finally to recover the said freight charges collected by defendant in excess of reasonable charges the defendant also knew that said excessive charges could and would be withheld by defendant for a long period of time, and that plaintiff would be deprived of the use in its business of that much of its capital, and that its business would thus be hampered and crippled. And plaintiff further states that by reason of said malicious acts of defendant a substantial part of plaintiff's capital is now wrongfully held by defendant, and plaintiff's business, as defendant maliciously intended that it should be, has been seriously crippled by defendant's said malicious acts, and plaintiff by reason of said acts has been compelled to borrow large sums of money, which but for said acts it would not have been compelled to borrow, and to pay large sums as interest on said borrowed capital, which but for said acts it would not have been compelled to pay, and plaintiff by reason of defendant's malicious acts, has been deprived of the use not only of the freight charges paid by plaintiff in excess of what said charges would have been if based upon the lumber rate, but has also been deprived of the use of said

33 money paid as interest."

BRUCE & BULLITT,
Attorneys for Defendant.

Said Special Demurrer filed on the 17th day of February, 1912, is as follows, to-wit:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

OHIO VALLEY TIE COMPANY, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Special Demurrer.

Paragraph 1.

Defendant demurs specially to so much of the petition herein as alleges that defendant caused to be charged and collected as compensation for hauling 89 car loads of cross ties an amount in excess of what should properly have been charged for said service; because it appears from said petition that a suit is pending between plaintiff and defendant in which defendant's alleged wrongful action in the collection of said excessive rates is alleged by plaintiff as a cause of action in favor of plaintiff against defendant; and because plaintiff has no right in this way to split up its complaints against defendant growing out of the same alleged wrong.

Paragraph 2.

Defendant demurs to so much of the petition herein, as complains of defendant's alleged wrong in publishing in its tariffs for the trans-

portation of interstate freight rates on cross ties which are alleged to be extortionate and unreasonable; because under the Act of Congress entitled "An Act to regulate Commerce", approved February 4, 1887, and its various amendments, the only tribunal having any right or power to give redress against the alleged wrongs complained of is the Interstate Commerce Commission of the United States, and this Court has no jurisdiction to give relief for the aforesaid alleged wrong, or wrongs.

BRUCE & BULLITT,
Attorneys for Defendant.

At a Court held on the 26th day of February, 1912.

The Court of its own motion, sets aside the order heretofore entered herein, overruling the defendant's motion to strike from the petition herein.

This action having been heard upon the defendant's motion to strike from the petition herein, and the Court not being advised, it is ordered that the said motion be and it is submitted.

This action having been heard upon the demurrer to the petition, and the Court not being advised, it is ordered that the said demurrer be and it is submitted.

At a Court held on the 30th day of March, 1912.

The Court being advised, endorsed an opinion upon the wrappers herein, which is ordered to be and is filled and made a part of the record herein.

Pursuant to said opinion, it is ordered and adjudged that the demurrer to the part of the petition as is designated in the first paragraph of the demurrer, be and is overruled, to which the defendant excepts.

35 It is ordered and adjudged that the demurrer to that part of the petition as is designated in the second paragraph of the demurrer be and is sustained, to which the plaintiff excepts.

It is ordered and adjudged that the motion to strike from the petition be and is sustained in part, and overruled in part, to which the plaintiff and defendant except.

It is ordered that the following words and sentences embraced in brackets in the 8th. paragraph of the motion be and are stricken from the petition to wit:

"Plaintiff further states that by reason of defendant's said malicious and unconscionable action in publishing rates on cross ties which it knew to be extortionate, and which it did not intend to defend in the event they should be attacked, and in refusing to change said classification, plaintiff has been compelled to employ attorneys to file complaints before the Interstate Commerce Commission to obtain reparation on account of said extortionate charges, and plaintiff will be compelled to pay reasonable fees to said attorneys in the prosecution of said complaints, which are now pending, and plaintiff will also be compelled to incur reasonable attorneys' fees in the prosecution of other complaints which it will be compelled to hereafter file before the Interstate Commerce Commission, to

recover the excessive charges assessed and collected upon other shipments under said tariffs, and that all said reasonable attorneys' fees will aggregate \$2500.00."

"when it published said extortionate interstate rates on cross-ties and"

36 "in publishing said extortionate rates and",

It is ordered that the whole of paragraph 9 of said motion be stricken from the petition to-wit:

"Plaintiff further states that while defendant knew that plaintiff would be able finally to recover the said freight charges collected by defendant in excess of reasonable charges the defendant also knew that said excessive charges could and would be withheld by defendant for a long period of time, and that plaintiff would be deprived of the use in its business of that much of its capital, and that its business would thus be hampered and crippled. And plaintiff further states that by reason of said malicious acts of defendant a substantial part of plaintiff's capital is now wrongfully held by defendant, and plaintiff's business, as defendant maliciously intended that it should be, has been seriously crippled by defendant's said malicious acts, and plaintiff by reason of said acts has been compelled to borrow large sums of money, which but for said acts it would not have been compelled to borrow, and to pay large sums as interest on said borrowed capital, which but — said acts it would not have been compelled to pay, and plaintiff by reason of defendant's malicious acts, has been deprived of the use not only of the freight charges paid by plaintiff in excess of what said charges would have been if based upon the lumber rate, but has also been deprived of the use of said money paid as interest."

As to the other items of said motion, it is ordered that the motion be and is overruled.

37 Said Written Opinion endorsed on the wrappers of the case on the 30th day of March, 1912, is as follows, to-wit:

1912, March 30th. The recovery of the amount of overcharges on freight for the 89 cars of ties is in the opinion of the Court not a bar to this action alleging the malicious & wrongful act, as an element in malicious destruction of pl'tf's business, the one is a recovery on an implied promise to pay a contract—the other a tort to be sustained only by the proof in part at least of other & additional facts such as would constitute force, fraud or malice. "The test of the identity of causes of action is the identity of the facts essential to maintain them." *Harrison v. Remington* 149 Fed. Rep. 385; *Louisville Gas Co. vs. Ky. Heating Co.*, 132 Ky. 435; *Julian vs. Pilcher* 2 Duv. 254; *Walker v. Mitchell*, 18 B. M. 541.

In *Coll's Adm'r vs. I. C. R. R. Co.* 120 Ky., 686, the right to recover the whole damage, rather the two items of damage could be prosecuted by the same action & established by the same evidence, & the Court properly held must be found. The demurrer to the part of the petition designated in the 1st item of the demurrer is ov'd. Ex. for def't.

It seems clear that the Interstate Commerce Commission has the

clusive right to determine whether certain interstate rates as
lished are unreasonable or discriminatory. This is expressly
d in Robinson vs. Baltimore &c. R. Co., (Jany. 9, 1912) U. S.
r. Crt. Advance Sheets Oct. Jan. 1911, Feby. 15, 1912, p. 114—
ile the Commission cannot award general damage, for the en-
ement of such extortionate or discriminatory rates, yet it can-
be adjudged that general damage has been sustained, until
Commission has determined the rate unreasonable—if the in-
ry could be first made by the Court, it might be found by the
Court that the rate was unreasonable, while the Commis-
sion *who* has full power might determine that the rate was
reasonable—the allegation of malice cannot aid the Court's
ht to inquire as to the reasonableness of the rate.

Demurrer to that part of the petition which is contained in the
l. item of the demurrer is sustained. Ex. for pl'tf. It seems
he Court that the better practice would be to incorporate in the
murrer such parts as in the demurrer is held insufficient by the
es.

On the 28th day of May, 1912, the following Amended Petition
s filed in the Clerk's office, to-wit:

erson Circuit Court, Common Pleas Branch, Second Division.

OHIO VALLEY TIE COMPANY, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Amended Petition.

Plaintiff, Ohio Valley Tie Company, for amendment to its peti-
n herein, states that between May 27, 1910, and April 10th,
11, it shipped 91 car loads of cross ties from Coal Creek, Tenn.,
d various points in Kentucky, on the line of defendant's rail-
ad to Cincinnati, Ohio, Indianapolis, Rushville, and Shirley,
d. and Erie, Pa., and that with the exception of the shipment
one car load from Coal Creek to Cincinnati, all other shipments
ferred to moved through Louisville, Ky. The plaintiff further
ates that the defendant made the entire haul in the case of said
shipment to Cincinnati, and assessed and collected thereon its reg-
arly published, interstate rates which exceeded the rates contem-
poraneously maintained by defendant for similar trans-
portation of lumber. Defendant further states that in the
case of said shipments which moved through Louisville,
defendant made only that pary of the haul from point of origin
Louisville, and that defendant assessed and collected on said ship-
ments its separately established rates to Louisville which were ap-
licable to interstate shipments, and that said rates exceeded the
tes contemporaneously maintained by defendant for similar
ansportation of lumber. Plaintiff further states that on September

15, 1911, it filed its complaint before the Interstate Commerce Commission complaining of the rates published and collected on said shipments of ties, and praying that defendant be required to cease and desist from charging or collecting for the transportation of cross ties in car loads from Coal Creek, Tenn., to Cincinnati, Ohio, and for the transportation of cross ties in car loads from said other points of origin to Louisville, Ky., when said ties were destined beyond said Louisville to points north of the Ohio river, any rates in excess of those contemporaneously maintained and applied by defendant to similar transportation of lumber of the kind of wood from which said ties are made, and further praying that defendant be required to make reparation to plaintiff in the sum of \$6,198.00 with interest on account of said unreasonable rates charged for the transportation of said 91 car loads of cross ties. The points of origin from which said cross ties were shipped, the number of car loads shipped from each of said points, the weight thereof, the rate assessed thereon as compared with the rate assessed on lumber, and the reparation claimed on each shipment, are set forth in a table filed herewith as part hereof marked Exhibit A. Plaintiff further states that on the 8th day of April, 1912, the Interstate Commerce Commission made an order granting the relief prayed by plaintiff in said complaint, a copy of which order is filed herewith as part hereof, marked Exhibit B. Plaintiff

40 further states that said order is now in full force and effect.

Plaintiff further states that prior to the publication of said extortionate rates on ties the Interstate Commerce Commission had repeatedly, and in every case in which the question had been presented to it, condemned rates on ties upon the sole ground that they were extortionate because in excess of the rates on the kinds of lumber, from which such ties were made, and in all the many cases in which complaint of such rates had been made to it the Interstate Commerce Commission had made an order or orders requiring the carriers who had collected rates on ties in excess of the lumber rates to refund to the shippers complaining the excess over the lumber rate collected within two years prior to the filing of the particular complaint, and had in all cases presented to it after it was given the power to prescribe rates for the future required the carrier complained of to establish rates on ties for the future, not in excess of the lumber rates.

Plaintiff further states that in the case of *Reynolds v. Western New York & Pennsylvania Railway Company*, and *G. Clinton Gardner, Receiver of The Buffalo, New York & Philadelphia Railroad Company*, reported in *Interstate Commerce Commission Reports*, Volume 1, page 393, in which the report of the Commission was filed January 13, 1898, it was held that it was unlawful, improper, and immoral for a railroad carrier to charge a higher rate on ties than it charged on lumber of the kinds from which the ties were made, and it was subsequently decided by the Interstate Commerce Commission, in many other cases, in some of which the Louisville & Nashville Railroad Company was defendant, that it

was unreasonable and unlawful to charge a higher rate on ties than was contemporaneously charged on the kinds of lumber from which such ties were made, among which cases were the following, decided on the dates named:

Beckman Lumber Company v. Chicago, Rock Island & Pacific Railway Company, decided June 24, 1909.

Chicago, Car Lumber Co. v. Louisville & Nashville Railroad Company, decided October 10, 1910.

Wheeler-Holden Company v. Louisville & Nashville Railroad Co. decided June 19, 1911.

Plaintiff further states that in each of said cases an order was made requiring the defendant carrier to refund the excess over the lumber rate.

Plaintiff further states that after said orders were made, and decisions rendered by the Interstate Commerce Commission, defendant both published and continued in force said extortionate rates on ties between the points named in said order of April 8, 1912, in case No. 4411 Sub. No. 1, with full knowledge of said decisions and with the wilful and malicious purpose of injuring plaintiff's business and of subjecting plaintiff to the annoyance and expense of proceedings to recover the excess over the lumber rates.

Plaintiff further states that defendant, although it had knowledge of said decisions and had had ample time after said decisions were made by said Interstate Commerce Commission and before said extortionate rates were collected from plaintiff to withdraw said unreasonable rates and to put into effect new tariffs, publishing rates on ties to conform to said rulings and decisions of the Interstate Commerce Commission, failed and refused to issue new tariffs changing said rates on ties. Plaintiff further states that defendant's acts in publishing said extortionate rates on ties and also in continuing said extortionate rates in effect were wilfully and maliciously done with full knowledge of all said rulings and decisions of the Interstate Commerce Commission, and for

the purpose of crippling and injuring the business of plaintiff and of other persons engaged in the business of buying cross-ties along the line of defendant's road for shipment to other points, and of driving them out of business, and that said tariffs to the extent that they published said extortionate rates were not published or continued in effect in good faith.

Plaintiff further states that the defendant when it published said extortionate rates on ties and when it failed and refused to withdraw or cancel said rates after they were published and to publish reasonable rates in lieu thereof, had reasonable ground to believe and did believe that the Interstate Commerce Commission would condemn said rates, as extortionate, and would require defendant to refund to plaintiff and to other shippers of cross-ties the excess collected over the lumber rate, and that defendant with that belief wilfully and maliciously published said rates for the purpose of harassing plaintiff and tying up its capital, and for the purpose of impairing its credit and otherwise injuring its business. Plaintiff further states that the Interstate Commerce Com-

mission in its report of the case of this plaintiff No. 4411 sub. No. 1, decided April 8, 1912, said:

"The attitude of the principal defendant in this and other recent cases involving rates on cross-ties has the appearance of a wilful disregard of the rulings of the Commission. The policy of the carrier hampers the industry, and discourages the producers of ties and subjects them to delay and expense incident to proceeding before the Commission."

Plaintiff further states that by reason of the wilful and malicious publication of said rates as aforesaid plaintiff was compelled to employ attorneys to present its complaint to the Interstate Commerce Commission and to press it to a hearing and that it has agreed to pay and will be compelled to pay said attorneys a fee of \$1,000.00 for their services, and that said fee is a reasonable fee for the services performed.

Plaintiff further states that all the expenses which it alleged in its original petition that it had incurred on account of the publication by defendant of extortionate interstate rates on ties, and the damages which it alleged in its said petition that it had suffered as a result of the publication of said interstate rates, were incurred and suffered as a result of the publication of said extortionate rates which were condemned by the Interstate Commerce Commission by its said order of April 8, 1912, in case No. 4411 Sub. No. 1, and plaintiff further states that the interstate rates and ties of the publication and collection of which it complains by its original petition are the rates condemned by said order of April 8, 1912.

Plaintiff further states that the defendant while it filed an answer to plaintiff's complaint No. 4411 Sub. No. 1, before the Interstate Commerce Commission, by which answer it denied that the rates complained of were unreasonable, yet it introduced no testimony on the hearing of said complaint and made no argument by brief or otherwise.

Plaintiff further states that after said complaint No. 4411 Sub. No. 1 was filed before the Interstate Commerce Commission plaintiff continued to make shipments of ties from the points named in said complaint through Louisville to points North of the Ohio river, and that defendant continued to charge and collect the said extortionate rates on ties complained of therein, and plaintiff further states that defendant has, in addition to the amount for which reparation was granted, by said order of April 8, 1912, under said complaint, collected from plaintiff since said complaint No. 4411 sub No. 1 was filed, considerable additional sums in excess of the lumber rate on ties shipped in car-loads from the various points of origin referred to in said order of April 8, 1912, through Louisville to points north of the Ohio River, and still holds said sums to which plaintiff is entitled.

Plaintiff further states that by the said wilful and malicious action of defendant in publishing said extortionate rates its capital amounting to many thousands of dollars has been tied up, and plaintiff's business hampered and crippled and its credit impaired.

and plaintiff subjected to annoyance and expense and the loss of valuable time of its officers, all of which was contemplated by defendant when it published and maintained and refused to recall said rates, and all of which injuries and damage defendant willfully and maliciously intended to inflict upon plaintiff by publishing said rates and continuing them in force.

Plaintiff further states that as a result of the action of defendant in requiring plaintiff to unload intrastate shipments of ties from cars in which they have been shipped to Louisville and reload them upon other cars for further shipment, as a condition of plaintiff's right to have intrastate rates assessed on such ties, as alleged in plaintiff's petition, plaintiff has been compelled to pay for the labor performed in making such transfers to date a large sum in the aggregate, the amount expended on that account to May 14, 1912, being \$635.66, and plaintiff will be compelled to pay additional sums to have similar transfers made in future. Plaintiff

45 further states that in addition to said sums actually paid out in order to have said transfers made, plaintiff has been compelled to assign one of its salaried employees to superintend the making of said transfers, and that said duty has required much of the time of said employee of the value of \$200.00, which would have been devoted to other work in the conduct of plaintiff's business but for defendant's action in requiring said transfers to be made.

Wherefore, plaintiff prays as in its original petition.

BODLEY & BASKIN,
HINES & NORMAN,
Attorneys for Plaintiff.

C. P. Bush, states that he is President and chief officer of the Ohio Valley Tie Company, and that the statements contained in the foregoing pleading are true, to the best of his knowledge and belief.

C. P. BUSH.

Subscribed and sworn to before me by C. P. Bush, this 27th. day of May, 1912. My commission expires January 24, 1914.

J. V. NORMAN,
N. P., J. C., Ky.

Said "Exhibit A" filed with the foregoing Amended Petition is as follows, to-wit:

EXHIBIT A.

Origin	Carloads	Weight	To Louisville and Cincinnati; rate per 100 pounds.		Repair
			Ties	Lumber.	
Coal Creek, Tenn.....	1	42,000	46	13	\$138
New Haven, Ky.....	2	117,100	22	7	175
Dunmor, Ky.	1	45,100	32	10	99
Lewisburg, Ky.	8	454,000	32	10	998
Salt River, Ky.....	8	384,300	12	5	269
Bardstown Junction, Ky.....	10	550,200	14	5	495
Shepherdsville, Ky.	6	340,200	12	5	238
Brooks, Ky.	8	324,600	10	4	194
Rockfield, Ky.	2	125,200	32	9	287
New Hope, Ky.....	1	56,200	22	7	84
Belton, Ky.	1	56,100	32	10	123
Deatsville, Ky.	4	197,700	16	5	217
Oakland, Ky.	7	376,150	32	8	902
Rocky Hill, Ky.....	1	40,200	32	8	120
Belmont, Ky.	13	687,900	14	5	619
Lotus, Ky.	3	158,160	16	5	173
Athertonville, Ky.	1	63,000	22	6	100
Lyons, Ky.	2	117,800	22	6	188
Boston, Ky.	1	52,600	18	6	63
South Park, Ky.....	4	242,100	7	3	96
Hubers, Ky.	2	77,500	10	4	46
Upton, Ky.	1	70,900	25	7	127
Bonnieville, Ky.	1	59,000	27	8	112
Smiths Grove, Ky.....	3	134,800	32	8	323
	91	4,782,810	\$6,198

47 Said "Exhibit B" filed with the foregoing Amended Motion is as follows, to-wit:

EXHIBIT B.

No. 4411 (Sub-No. 1).

OHIO VALLEY TIE COMPANY

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY; THE PITTSBURGH & CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY; CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY; THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, and THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY.

This case being at issue upon complaint and answers on file, having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had

and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, That defendant Louisville & Nashville Railroad Company be, and it is hereby, authorized and directed to pay unto complainant, Ohio Valley Tie Company, on or before the 1st day of July, 1912, the sum of \$6,198, with interest thereon at the rate of 6 per cent per annum from April 21, 1911, as reparation for unreasonable rates charged for the transportation of 91 carloads of cross ties from Coal Creek, Tenn., to Cincinnati, Ohio, and from points of origin in Kentucky to Louisville, Ky., said ties all being
48 destined to points north of the Ohio River, as more fully and at large appears in and by said report of the Commission herein.

It is further ordered, That the above-named defendant be, and it is hereby notified and required to cease and desist, on or before the 1st day of July, 1912, and for a period of two years thereafter to abstain from charging, demanding, collecting, or receiving its present rates for the transportation of cross ties in carloads from Coal Creek, Tenn., to Cincinnati, Ohio, and for the transportation of cross ties in carloads from New Haven, Dunmor, Salt River, Bardstown, Junction, Shepherdsville, Brooks, Rockfield, New Hope, Belmont, Deatsville, Oakland, Rocky Hill, Belmont, Lotus, Athertonville, Lyons, Boston, South Park, Hubers, Upton, Bonnieville, and Smiths Grove, Ky., to Louisville, Ky., when said ties are destined beyond said Louisville to points North of the Ohio River.

And it is further ordered, That said defendant be, and it is hereby notified and required to establish, on or before the 1st day of July, 1912, and for a period of two years thereafter to maintain and apply to the transportation of cross ties from Coal Creek, Tenn., to Cincinnati, Ohio, and from the other points of origin named in the next preceding paragraph to Louisville, Ky., when said ties are destined beyond said Louisville to points North of the Ohio River, rates not to exceed of those contemporaneously maintained and applied by it to similar transportation of lumber of the kind of wood from which said ties are made.

At a court held on the 1st day of June, 1912.

This action was set at rules by the plaintiff on May 27th, 1912.

49 Upon motion of the plaintiff by counsel, it is ordered that this action be remanded.

At a court held on the 8th day of June, 1912.

This action was set at rules by the plaintiff on the 3rd inst.

Came the defendant, by counsel, and moved the Court on a written motion filed, to strike certain words and phrases from the amended petition, to which the plaintiff objects.

It is ordered that the said motion be submitted.

Said Written Motion to Strike filed on the 8th day of June, 1912, is as follows, to-wit:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

Motion.

OHIO VALLEY TIE COMPANY, Plaintiff,

VS.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Defendant, Louisville & Nashville Railroad Company, moves the Court to strike from the amended petition the following words, to-wit:

"Plaintiff further states that in the case of Reynolds vs. Western New York & Pennsylvania Railway Company and G. Clinton Gardner, Receiver of The Buffalo, New York & Philadelphia Railroad Company, reported in Interstate Commerce Commission Reports, Volume 1, page 393, in which the report of the Commission was filed January 13, 1888, it was held that it was unlawful, 50 improper and immoral for a railroad carrier to charge a higher rate on ties than it charged on lumber of the kinds from which the ties were made, and it was subsequently decided by the Interstate Commerce Commission, in many other cases, in some of which the Louisville & Nashville Railroad Company was defendant, that it was unreasonable and unlawful to charge a higher rate on ties than was contemporaneously charged on the kinds of lumber from which such ties were made, among which cases were the following decided on the dates named:

Beekman Lumber Company v. Chicago, Rock Island & Pacific Railway Company, decided June 24, 1909.

Chicago Car Lumber Co. v. Louisville & Nashville Railroad Company, decided October 10, 1910.

Wheeler-Holden Company v. Louisville & Nashville Railroad Co., decided June 19, 1911.

Plaintiff further states that in each of said cases an order was made requiring the defendant carrier to refund the excess over the lumber rate."

Defendant also moves the Court to strike from said amended petition the following words, to-wit:

"Plaintiff further states that after said orders were made and decisions rendered, by the Interstate Commerce Commission defendant both published and continued in force said extortionate rates on ties between the points named in said order of April 8, 1912, in case No. 4411 Sub. No. 1, with full knowledge of said decisions and with the wilful and malicious purpose of injuring plaintiff's business and of subjecting plaintiff to the annoyance and expense of proceeding to recover the excess over the lumber rates."

Defendant also moves the Court to strike from the amended petition the following words, to-wit:

51 "Plaintiff further states that the Interstate Commerce Commission in its report of the case of this plaintiff No. 4411 sub. No. 1, decided April 8, 1912, said:

the attitude of the principal defendant in this and other recent involving rates on cross-ties has the appearance of a wilful disregard of the rulings of the Commission. The policy of this carrier pers the industry, and discourages the producers of ties and sub them to the delay and expense incident to proceedings before Commission.'"

Defendant also moves the Court to strike from said amended petition the following words, to-wit:

Plaintiff further states that the defendant while it filed an answer to plaintiff's complaint No. 4411 Sub. No. 1, before the Interstate Commerce Commission by which answer it denied that the defendant complained of were unreasonable, yet it introduced no testimony on the hearing of said complaint and made no argument by it or otherwise."

Defendant also moves the Court to require plaintiff to make its amended petition more specific and state what rates and amounts on what shipments defendant has collected as alleged in that petition of the amended petition which complains that after complaint No. 4411 was filed before the Interstate Commerce Commission defendant continued to charge and collect extortionate rates on ties.

Defendant also moves the court to require plaintiff to fill the blank on the last page of said amended petition.

BRUCE & BULLITT,
Att'ys for Def't.

At a court held on the 29th day of June, 1912.

The Court being advised, it is ordered and adjudged that the defendant's motion to require the plaintiff to make the petition more specific be and is overruled, to which the defendant excepts.

It is ordered and adjudged by the court that the defendant's motion to require the plaintiff to fill the blanks in the petition be and is overruled, to which the defendant excepts.

It is ordered and adjudged by the court that the defendant's motion to strike from the amended petition be and is sustained, to which the plaintiff excepts.

It is ordered by the Court that the following words and phrases be and are stricken from the amended petition to-wit:

Plaintiff further states that in the case of Reynolds v. Western New York & Pennsylvania Railway Company and G. Clinton Gardner, Receiver of The Buffalo, New York & Philadelphia Railroad Company reported in Interstate Commerce Commission

Reports, volume 1, page 393, in which the report of the Commission was filed January 13, 1888, it was held that it was unlawful, proper and immoral for a railroad carrier to charge a higher rate on ties than it charged on lumber of the kinds from which the ties were made, and it was subsequently decided by the Interstate Commerce Commission, in many other cases, in some of which the Louisville & Nashville Railroad Company was defendant, that it was unreasonable and unlawful to charge a higher rate on ties than was contemporaneously charged on the kinds of lumber from which

such ties were made, among which cases were the following, decided on the dates named:

Beekman Lumber Company v. Chicago, Rock Island & Pacific Railway Company, decided June 24, 1909.

Chicago Car Lumber Co. v. Louisville & Nashville Railroad Company, decided October 10, 1910.

Wheeler-Holden Company v. Louisville & Nashville Railroad Co., decided June 19, 1911.

Plaintiff further states that in each of said cases, an order was made requiring the defendant carrier to refund the excess over the lumber rate."

"Plaintiff further states that after said orders were made and decisions rendered by the Interstate Commerce Commission, defendant both published and continued in force said extortionate rates on ties between the points named in said order of April 8, 1912, in case No. 4411 Sub No. 1 with full knowledge of said decisions and with the wilful and malicious purpose of injuring plaintiff's business and of subjecting plaintiff to the annoyance and expense of proceedings to recover the excess over the lumber rates."

54 "Plaintiff further states that the Interstate Commerce Commission in its report of the case of this plaintiff No. 4411 sub. No. 1, decided April 8, 1912, said:

"The attitude of the principal defendant in this and other recent cases involving rates on cross ties has the appearance of a wilful disregard of the rulings of the Commission. The policy of this carrier hampers the industry, and discourages the producers of ties and subjects them to the delay and expense incident to proceedings before the Commission."

"Plaintiff further states that the defendant while it filed an answer to plaintiff's complaint No. 4411 Sub. No. 1 before the Interstate Commerce Commission by which answer it denied that the rates complained of were unreasonable, yet it introduced no testimony on the hearing of said complaint and made no argument by brief or otherwise."

To which the plaintiff excepts.

At a court held on the 28th day of September, 1912.

This action was set at rules by the plaintiff on the 23rd inst.

Upon motion of the plaintiff by counsel, it is ordered that this action be remanded.

55 On the 1st day of October, 1912, the following Second Amended Petition was filed in the Clerk's Office, to-wit:

Person Circuit Court, Common Pleas Branch, Second Division.

OHIO VALLEY TIE COMPANY, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Second Amended Petition.

Plaintiff, Ohio Valley Tie Company, for further amendment to petition herein, states that by an order of the Interstate Commerce Commission issued on the 8th day of April, 1912, defendant is required to establish by April 1st, 1912, and to maintain for years thereafter rates on cross ties from a large number of stations in Kentucky to Louisville, Ky., when billed to points beyond Louisville, the same as the rates charged for similar hauls of lumber, that defendant did pursuant to said order, establish said rates effective July 1st, 1912, and has ever since maintained said rates; thereby the rates lawfully applicable on all shipments of cross from said stations from April 1st, 1912, have been the same for

the haul to Louisville whether said shipments were billed to Louisville or to points beyond Louisville. Plaintiff further states that although since said order of the Interstate Commerce Commission became effective the rates for the shipment of to Louisville, Ky., as part of an interstate movement from points named in said order have been the same as the rate on intrastate shipments of ties to Louisville, Ky., the defendant has continued to wilfully and maliciously annoy and harass the plaintiff as alleged in petition and has continued to wilfully and maliciously refuse to deliver upon the tracks of the Pennsylvania Terminal Railway Company its cars loaded with ties consigned to plaintiff in care of the Pennsylvania Company, or for delivery upon the tracks of said company or consigned by plaintiff to said Company except upon condition that said cars be at once unloaded and returned to defendant.

Plaintiff further states that since its original petition was filed before and since said order of the Interstate Commerce Commission became effective it has shipped many cars of ties from the points named in said order billed to plaintiff in care of railroad companies other than defendant or for delivery upon the tracks of such companies or consigned by plaintiff to such companies, and plaintiff states that said ties have been intended for delivery by plaintiff to said companies who have desired to carry said ties for their own use to different points on their respective lines in the cars in which they were originally shipped, and that plaintiff by reason of defendant's wilful and malicious refusal to deliver said ties upon the tracks of other companies in the cars in which they were originally shipped except on condition that they be unloaded and returned to defendant has been compelled under his contracts with said railroad companies to cause said ties to be unloaded and transferred to other cars furnished by said railroad companies. Plaintiff further states that the cost of unloading and transferring

said ties both before and after said order of the Interstate Commerce Commission became effective has been 1½ cents per tie making from \$5.00 to \$7.00 per car, which is a reasonable charge for the service, and that said cost now amounts in the aggregate to the sum of \$771.56 and that plaintiff has thereby been damaged in said sum. Plaintiff further states that the ties referred to in its original petition as shipped by plaintiff over defendant's line were also intended by plaintiff for delivery to railroad companies other than defendant and that such other railroad companies desired to forward said ties over their own lines for their own use, and plaintiff states that it was subjected to the expense of transferring said ties from the cars in which they were originally shipped for the same reasons for which they were subjected to the expense of unloading and transferring the ties shipped subsequent to the filing of plaintiff's petition as hereinbefore alleged. Plaintiff further states that while at one time as alleged in the petition, the defendant absolutely refused

58 to deliver ties consigned by plaintiff to other railroad companies or in their care upon the connecting tracks of said companies unless plaintiff would pay the interstate rate yet that thereafter and prior to the date at which said order of the Interstate Commerce Commission became effective the defendant did offer to deliver said ties to plaintiff upon the tracks of such other companies upon condition that said ties be taken at once from the cars in which they were loaded and the cars returned to defendant, and that plaintiff was compelled to and did comply with said condition at the cost hereinbefore alleged, and plaintiff states that said condition was wilfully and maliciously imposed by defendant. Plaintiff further states that during all said times both before and since said order of the Interstate Commerce Commission became effective defendant has continued to observe the custom alleged in the petition of delivering its unloaded cars upon the connecting tracks of other companies when containing shipments made by persons other than plaintiff and billed in the same way in which plaintiff's ties were billed and of permitting said shipments by persons other than plaintiff to go forward over the lines of such other companies in the same cars in which they were shipped over defendant's line, and that defendant in refusing to permit cars loaded with ties shipped by plaintiff to go forward over other lines while observing the custom of permitting cars loaded with shipments made by other persons to go forward over other lines defendant has acted wilfully and maliciously and has unjustly, wilfully and maliciously discriminated against plaintiff.

59 Plaintiff further states that all of said ties were billed in care of the Pennsylvania Company or for Pennsylvania delivery or to the Pennsylvania Company, and that it is now and has always been the custom of defendant to deliver upon the tracks of the Pennsylvania Terminal Railway Company without condition all cars so billed when containing shipments made by persons other than plaintiff.

Plaintiff further states that since the order of the Interstate Commerce Commission hereinbefore referred to was made the defendant

as continued to wilfully and maliciously refuse to accept cars of the Pennsylvania Company or cars under control of the Pennsylvania Terminal Railway Company when offered to defendant for shipment of plaintiff's ties to Louisville, Ky., from the points named in said order even when the defendant has been unable or unwilling to furnish its own cars for that purpose, and plaintiff states that by reason of defendant's wilful and malicious refusal to either furnish its own cars for shipment of plaintiff's ties or to accept the cars of said other companies when tendered to it for that purpose the plaintiff has been unable to move many of its ties, and that the shipment of said ties by reason thereof has been unreasonably delayed, and said ties have been thereby unduly exposed to the weather, and have been greatly injured by said delay to the damage of plaintiff in the sum of \$10,000.00. Plaintiff states that during all said time has been the custom of defendant to accept the cars of other companies for the purpose of making shipments from points on its own line for persons other than plaintiff when it could not furnish its own cars for that purpose, and plaintiff states that in refusing to accept the cars of other companies tendered for plaintiff's shipments while observing the customs of accepting such cars when tendered for the shipment of other persons under substantially similar circumstances and conditions the defendant has acted wilfully and maliciously, and has unjustly, wilfully and maliciously discriminated against plaintiff. Plaintiff further states that all the acts of defendant hereinbefore alleged have been unlawfully, wilfully and maliciously committed for the purpose of injuring plaintiff in its business and driving plaintiff out of business so that defendant may be rid of — competitive buyer of cross-ties along its lines.

Wherefore, plaintiff prays as in its original petition and former amended petition.

BODLEY & BASKIN,
HINES & NORMAN,
Attorneys for Plaintiff.

C. P. Bush states that he is President and Chief Officer of the Ohio Valley Tie Company, and that the statements contained in the foregoing are true, to the best of his knowledge and belief.

C. P. BUSH.

Subscribed and sworn to before me by C. P. Bush, this 1st day of October, 1912. My Commission expires January 30th, 1916.

GEO. R. EWALD,
Notary Public, Jefferson County, Ky.

1 At a Court held on the 12th day of October, 1912.

This action was set at rules by the plaintiff on the 7th inst. Came the defendant by counsel, and moved the Court on a written motion filed, to strike certain words and sentences from the amended petition filed herein October 2nd, 1912, to which the plaintiff objects.

It is ordered that the said motion be submitted.

ness in the manufacture, purchase or sale of cross-ties; or as to whether or not it has expended large sums of money or acquired large quantities of machinery, saw-mills or other appliances used in the manufacture of cross-ties or as to what sums of money it has expended, or what machinery, saw-mills or other appliances it has required in said business; or as to whether or not it has acquired large quantities of cross-ties or standing cut timber along the lines

66 of defendant's road or as to what quantities of cross-ties or standing cut timber it has acquired or as to whether or not

they are suitable to the manufacture of cross-ties or are located conveniently for shipment on said lines of road; or as to whether or not plaintiff has built up a large or lucrative business, handling or that it has been handling approximately one million cross-ties each year, or as to what ties it has handled; or as to whether or not said business yields plaintiff a large or any annual profit; or as to whether or not plaintiff has made large contracts whereby it has agreed to sell or deliver at Louisville, Kentucky, more than 400,000 cross-ties, or as to what contracts it has made or as to how many cross-ties it has agreed to sell or deliver at Louisville, or as to whether or not plaintiff has established or possesses a high character or reputation for conducting its business or has acquired a good will in said business or as to whether such good will is worth one hundred thousand dollars or any sum.

It denies that it has wickedly, maliciously, or unlawfully contrived or intended to injure plaintiff or its business or that any act complained of in the petition has been done by it for the purpose of preventing plaintiff from buying cross-ties at or near places along the lines of defendant, or so that it might be rid of a competitive buyer of such cross-ties or be able to buy cross-ties at prices lower than it would have to pay while plaintiff remains such competitive buyer.

67 It denies that the rates which it charged and collected on the 89 carloads of cross-ties referred to in the petition or that any of them was unlawful or excessive or that it then or at any time knew that said shipments were intrastate shipments.

It denies that in many cases, the freight charges based upon fifth class rate exceed the selling price for the cross-ties or that in all or any other instances such charges amount to a large or unreasonable per cent of the selling price of the cross-ties. It denies that it has collected any excessive charges.

It admits that in certain cases the Interstate Commerce Commission has held rates on cross-ties in excess of the rates on lumber to be too high, but it denies that there has been or is any fixed rule on that subject and it denies that all or any interstate tariffs of defendant issued or re-issued within five years last past, and which have published a higher rate on cross-ties than the rate published on the kinds of lumber from which said cross-ties were made, have been issued by defendant with the knowledge that such rates were extortionate or have been issued with the wilful or malicious purpose of crippling or injuring the business of plaintiff or of persons engaged in the business of buying cross-ties or that such tariffs to the

tent that they have published said rates have not been published in good faith.

It denies that it has maliciously failed or refused to change its classification on cross-ties.

Defendant has no knowledge or information sufficient to form a belief as to what contracts with the Big Four Railroad the Pennsylvania Company for the sale to them or either of them cross-ties to be delivered to them at Louisville, Ky., plaintiff has. It denies that the tracks of the Big Four Railroad Company are physically connected with the tracks of defendant.

It denies that it has been continuously during all the times mentioned in the petition or still is the uniform custom of defendant when lumber or other goods except live-stock are shipped in carloads over its lines to Louisville, Ky., consigned to individuals, firms or corporations, including railroad corporations or in care of such railroad companies having tracks physically connected in Louisville with the tracks of said Louisville & Nashville Railroad Company, or having tracks physically connected in Louisville with the tracks of other railroad companies—such other railroad companies having also tracks physically connected in Louisville with the tracks of the Louisville & Nashville Railroad Company—to make deliveries of lumber or other goods (except live stock) when shipped in carload lots by delivering said cars, loaded as aforesaid, upon the tracks so connecting with the tracks of said Louisville & Nashville Railroad Company; or that it has within the last three months prior to the filing of the petition uniformly observed or followed that alleged custom in making deliveries of all carload lots of cross-ties or lumber hauled for plaintiff over its lines from points in Kentucky to Louisville, Kentucky, consigned as aforesaid. It says there is and has been no uniform custom on the subject referred to; that while it has sometimes made deliveries as described in the petition, yet it has always asserted and frequently exercised the right of refusing to do so, not only where shipments were made for plaintiff, but also in cases of shipments made for parties other than plaintiff.

It has no knowledge or information sufficient to form a belief as to whether the expense to plaintiff of transferring cross-ties from one car to another has been \$5.00 per car or what the same has been.

It denies that it has imposed any restriction upon plaintiff which it has not imposed upon other shippers with respect to similar shipments.

Likewise in the matter of accepting cars of other companies to be used in making shipments, it is true that defendant does sometimes accept such cars, and on the other hand frequently refuses to accept the same.

It denies that it maliciously refused to deliver upon the tracks of the Pennsylvania Company a large or any number of cars loaded with cross-ties consigned to plaintiff.

It denies that prior to the issuance of the circular referred to in the petition it had given orders to its various agents along its line in Kentucky, to place no cars and to receive no cross-ties from

plaintiff for shipment in carloads from other points in Kentucky to Louisville, Ky., except in cases where the intrastate and interstate hauling charges were, according to said tariff, the same from such other points to Louisville, Ky.

70 As to the injunction granted by the Jefferson Circuit Court, and referred to in the petition, defendant says same was only a temporary injunction and was never made permanent.

It denies that it knew when it refused to refund any part of the charges it had collected on the 89 cars referred to in the petition that the shipments thereof were intrastate shipments or took only intrastate rates; and denies that they were or any of them was intrastate shipments.

It denies that on being applied to by certain persons to furnish empty cars on switches connecting with defendant's line in Bullitt County to be loaded with cross-ties to be shipped to the Louisville Railway Company at Louisville, it wilfully or maliciously or in pursuance of any design or purpose to injure plaintiff or its business or at all did inform said persons that it would not furnish such cars until they would give defendant assurance that said cross-ties were not intended for plaintiff or that by any such alleged act it intended, maliciously or at all to make the impression upon the public that plaintiff could not get cars for the shipment of cross-ties or sought maliciously or at all, by that or any other means, to make the impression upon the public that plaintiff would be compelled to retire from the business of buying cross-ties on defendant's line or maliciously or at all sought out any persons from whom plaintiff was or is in the habit of buying cross-ties and tried to induce such person to sell said cross-ties to the defendant instead of to plaintiff.

71 Defendant has no knowledge or information sufficient to form a belief as to what was plaintiff's motive for shipping certain ties referred to in the petition from East Bernstadt, Kentucky, to Cincinnati, Ohio. It denies that its action in requiring the transfers of ties to be made from its cars was intended to drive away plaintiff's customers or to cause them to go to other markets for ties. And it has no knowledge or information sufficient to form a belief that the continuation of such a demand on its part will either cause plaintiff's customers to buy their ties from other persons or will compel plaintiff to deliver its ties at other points than Louisville or to pay greater freight charges to such points of delivery than plaintiff is required to pay to Louisville.

It denies that pursuant to any malicious purpose to injure plaintiff's business or at all, it has wilfully or maliciously delayed or persists in delaying to furnish cars to plaintiff, after request therefor, for the loading or shipment of cross-ties placed on defendant's right-of-way for shipment. It has no knowledge or information sufficient to form a belief as to whether or not by reason of any delays in furnishing cars or at all any cross-ties belonging to plaintiff have been exposed to weather or have deteriorated in value or as to whether or not plaintiff has been unable by reason of any such delays to

comply with its contracts to deliver said ties to purchasers at the times agreed upon or that an annoyance has been caused to plaintiff's customers or the postponement of the payment for cross-ties.

72 It denies that it has maliciously or at all demanded before furnishing cars to plaintiff, upon request, for shipment or cross-ties that plaintiff should disclose to defendant the places or persons to which and to whom said cars when loaded were to be consigned, except where it believed that plaintiff was intended to make what would be in truth and in fact interstate shipments of said cross-ties, but under the false pretense of making intrastate shipments of same.

Defendant has no knowledge or information sufficient to form a belief as to what time plaintiff has been compelled to give to the transportation or delivery of shipments referred to in the petition, which it could not have been required to give but for any acts complained of on the part of defendant or as to what such time was worth or as to what attorneys it has been compelled to employ or as to what attorneys' fees it has been compelled or will be compelled to pay by reason of any act of defendant complained of in the petition; but denies that by any of its acts it intended to impose upon the plaintiff the burden of paying such attorneys' fees. It has no knowledge or information sufficient to form a belief as to whether or not by any act on its part complained of in the petition, plaintiff's credit has been greatly or at all impaired or plaintiff compelled to instruct its buyers to cease buying ties along defendant's line or that plaintiff has thereby lost opportunity to buy many or any ties or has lost large or any profits which it would have made on such ties; but it denies that any such loss has resulted directly or at all from any act on the part of defendant. It denies that by any act of defendant, plaintiff was or is greatly delayed in the performance of its contracts for the sale and delivery of cross-ties or has been or is greatly or at all harassed or annoyed or injured in its business or subject to great or any expense or loss of time or has been or is damaged

73 in the sum of \$100,000.00.

Further answering and especially in response to plaintiff's first amended petition, defendant denies that the rates published by it as therein complained of, were extortionate or that its publication thereof was wilfully or maliciously done for the purpose of crippling or injuring the business of plaintiff or of other persons engaged in the business of buying cross-ties along the line of defendant's road or of driving them out of business or that said rates were not published or continued in good faith or that it wilfully or maliciously published said rates for the purpose of harassing plaintiff or tying up its capital or impairing its credit or otherwise injuring its business.

It has no knowledge or information sufficient to form a belief as to what plaintiff has agreed to pay or will be compelled to pay attorneys for their services in making complaint before the Interstate Commerce Commission as alleged in the Amended Petition, or as to whether or not One Thousand Dollars would be a reasonable fee for such services. It has no knowledge or information sufficient

to form a belief as to whether or not by any action on its part complained of in the petition, plaintiff's capital or any part thereof has been tied up or plaintiff's business hampered or crippled or credit impaired or plaintiff subjected to annoyance or expense or loss of valuable time of its officers; but it denies that any such thing was contemplated by defendant when it published or maintained or refused to recall its rates complained of; or that any action on the part of defendant was wilfully or maliciously intended by it to inflict injury and damage upon plaintiff.

74 It has no knowledge or information sufficient to form a belief as to whether or not plaintiff has been compelled to pay \$635.66, or as to what sum it has been compelled to pay for labor performed in making transfers of ties from one car to another, or as to whether or not plaintiff has been compelled to assign one of its salaried officers to superintend the making of such transfers or as to whether or not such duty has required much or any of such officer's time.

Further answering and especially as responsive to the second amended petition of plaintiff, defendant denies that it has continued to wilfully or maliciously or at all annoy or harass plaintiff or alleged in the petition or at all, or has maliciously refused to deliver upon the tracks of the Pennsylvania Terminal Railroad Company its cars loaded with cross-ties consigned to plaintiff in care of the Pennsylvania Company, or for delivery upon the tracks of said company or consigned by plaintiff to said company except upon condition that said cars be at once unloaded and returned to defendant.

It has no knowledge or information sufficient to form a belief as to whether the cost of unloading or transferring the ties as complained of in the second amended petition has been 1½ cents per tie, making from five to seven dollars per car or as to whether or not such cost amounts in the aggregate to the sum of \$771.50 or as to whether said cost has been a reasonable charge or as to what said cost has been.

75 It denies that the condition alleged in the second amended petition to have been imposed by it upon the delivery of cross-ties was maliciously imposed.

It denies that during all the times before or since the order of the Interstate Commerce Commission became effective as referred to in the second amended petition, defendant has continued to observe the custom alleged in the original petition of delivering its loaded cars upon the connecting tracks of other companies when containing shipments made by persons other than plaintiff, and billing in the same way in which plaintiff's ties were billed or of permitting said shipments by persons other than plaintiff to go forward over the lines of such other companies in the same cars in which they were shipped over defendant's line, or that defendant in refusing to permit cars loaded with ties shipped by plaintiff to go forward over other lines acted maliciously or unjustly or has by any such action acted maliciously or at all discriminated against the plaintiff.

It denies that it is now or has always been the custom of defendant to deliver upon the tracks of the Pennsylvania Terminal Railroad

road Company without condition all cars billed in care of the Pennsylvania Company or for Pennsylvania delivery or to the Pennsylvania Company when containing shipments made by persons other than plaintiff.

It denies that since the order of the Interstate Commerce Commission referred to in the second amended petition was made, it has continued to wilfully or maliciously or at all refuse to accept cars of the Pennsylvania Company or cars under control of the Pennsylvania Terminal Railroad Company when offered to defendant for shipment of plaintiff's ties to Louisville, Kentucky, from the points named in said order when defendant has been unable or unwilling to furnish its own cars for that purpose;

76 and it denies that by reason of any such refusal plaintiff has been unable to move many or any of its ties. Or that by reason thereof, the shipment of said ties has been unreasonably delayed or said ties unduly exposed to the weather or greatly or at all injured by any such delay to the damage of plaintiff in the sum of \$10,000 or any sum. It denies that its alleged action complained of has been malicious or unjust or that it has maliciously or at all discriminated against plaintiff.

It denies that all or any of the alleged acts of defendant complained of by plaintiff has been unlawfully, wilfully or maliciously committed for the purpose of injuring plaintiff in its business or driving plaintiff out of business so that defendant might be rid of a competitive buyer of cross-ties along its lines.

Paragraph No. 2.

Further answering, the defendant says that since the institution of this action, plaintiff has prosecuted to judgment the action referred to in the original petition herein by plaintiff against defendant to recover the amount of alleged excessive charges made by defendant upon the 89 carloads of cross-ties referred to, and has recovered judgment against defendant for said alleged excessive charges.

Wherefore, defendant prays to be hence dismissed with its costs.

BRUCE & BULLITT,
Att'ys for Def't.

77 At a court held on the 16th day of November, 1912.

This action was set at rules by the plaintiff on the 11th inst.

Upon motion of the plaintiff by counsel, it is ordered that this action be assigned to March 24th, 1913, for trial.

At a Court held on the 27th day of February, 1913.

Upon motion of the plaintiff by counsel, in writing filed, it is ordered that the amended petition and second amended petition heretofore filed, in the Clerk's office, be and are noted of record.

Said writing filed on the 27th day of February, 1913, is as follows, to-wit:

Jefferson Circuit Court, Common Pleas Branch, Second Division

OHIO VALLEY TIE COMPANY, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Motion.

78 Plaintiff moves the court to enter an order noting of record the filing of the Amended Petition, and the Second Amended Petition heretofore filed in the Clerk's office.

HINES & NORMAN,
BODLEY & BASKIN,
Attorneys for Plaintiff.

Notice waived,

HELM BRUCE,
For Deft.

At a Court held on the 18th day of March, 1913.

By agreement of the parties by counsel, in open court, it is ordered by the court that this action be reassigned to April 18th, 1913.

At a court held on the 21st day of April, 1913.

Came the parties by counsel, and to try the issue joined, came Jury as follows to wit: Jeremiah Murphy, Herman Fruechtenech Jos. R. Boesser, H. C. Evans, H. E. Ritze, E. R. Bate, F. L. Huecher Wm. Raggio, John A. Ruth, Sam W. McKnight, T. E. Wiggington John Flanagan, who were duly and regularly selected and sworn as required by law.

Upon motion of the defendant, by counsel, it is ordered by the court that G. H. Boone, Official reporter for this Court be and he is appointed to take down the testimony in this action as required by law.

A portion of the evidence being heard, and there not being time to conclude the trial of this action on to-day, the Jury were permitted to separate with instructions from the Court to return here tomorrow morning at 9 o'clock.

79 Before being permitted to separate the Jury were admonished by the Court as required by law, that it is their duty not to converse with nor suffer themselves to be addressed by any other person upon the subject of the trial, and that during the trial it is their duty not to converse with nor suffer themselves to be addressed by any other person upon the subject of the trial, and that during the trial, it is their duty not to form nor express an opinion thereon until the case is finally submitted to them.

At a Court held on the 22nd day of April 1913.

Came the parties by counsel, and the Jury selected and sworn herein and again took their seats in Court.

At the conclusion of the evidence for the plaintiff, came the defendant by counsel and moved the Court to peremptorily instruct the jury to find for the defendant, to which the plaintiff objects.

The Court being advised, it is ordered that said motion be overruled, to which the defendant excepts.

There not being time to conclude the trial of this action on today, the Jury were permitted to separate with instructions to return here tomorrow morning at 10 o'clock.

Before being permitted to separate, the Jury were admonished by the Court as required by law, that it is their duty not to converse with nor suffer themselves to be addressed by any other person upon the subject of the trial, and that during the trial, it is their duty not to form nor express an opinion thereon until the case is finally submitted to them.

80 At a Court held on the 23rd day of April, 1913.

Came the parties by counsel, and the Jury selected and sworn herein, and again took their seats in Court.

A further portion of the evidence being heard, and there not being time to conclude the trial of this action on today, the Jury were permitted to separate with instructions to return here tomorrow morning at 9 o'clock.

Before being permitted to separate the Jury were admonished by the Court as required by law, that it is their duty not to converse with nor suffer themselves to be addressed by any other person upon the subject of the trial, and that during the trial it is their duty not to form nor express an opinion thereon until the case is finally submitted to them.

At a Court held on the 24th day of April, 1913.

Came the parties by counsel, and the Jury selected and sworn herein and again took their seats in Court.

At the conclusion of all the evidence, came the defendant by counsel and moved the Court to peremptorily instruct the jury to find for the defendant, to which the plaintiff objects.

The Court being advised, it is ordered that said motion be overruled, to which the defendant excepts.

Came the defendant by counsel and tendered to the Court written instructions Numbered 1, 2, 3, and 4, to be given to the Jury, to which the plaintiff objects.

81 The Court being advised, refused said instructions, to which the defendant excepts.

Thereupon the Court instructed the Jury as shown by written instructions numbered 1, 2, 3, 4, 5, and 6, to the giving of which the plaintiff and defendant by counsel objected and excepts.

The arguments of counsel having been heard, the Jury retired to consider of their verdict.

The Jury being unable to agree upon a verdict, and there not being time to consider further of their verdict on today, the jury were permitted to separate with instructions to return here tomorrow morning at 9 o'clock to further consider of their verdict.

Before being allowed to separate, the Jury were admonished by the Court as required by law, that it is their duty not to converse with nor suffer themselves to be addressed by any other person upon the subject of the trial, and that during the trial, it is their duty not to form nor express an opinion thereon until the case is finally submitted to them.

At a Court held on the 25th day of April, 1913.

Came the parties by counsel, and the Jury selected, and sworn herein again took their seats in Court.

Thereupon the Jury retired to consider of their verdict, and afterwards reported the following verdict to-wit:

We, the Jury find for the plaintiff for the sum:

771.56 Expense of transferring ties as mentioned in article No. 4.

1000.00 Attorneys' fee.

200.00 Loss of time and service performed.

5000.00 Injury to plaintiff's ties.

82 50,000.00 Damage to plaintiff's business and credit as mentioned in article No. 1.

T. E. WIGGINGTON, Foreman.

It is therefore ordered and adjudged by the Court that the plaintiff, Ohio Valley Tie Company, recover of the defendant, Louisville & Nashville Railroad Co. the sum of Fifty-six Thousand and Nine Hundred and Seventy one Dollars and Fifty-six cents (\$56,971.56), being the amount assessed by the Jury in their verdict herein, with interest thereon at the rate of six per cent per annum from April 25th, 1913, until paid and its costs herein expended, for which it may have execution.

It is ordered by the Court that G. H. Boone, official reporter for this Court, be and he is allowed the sum of Twenty (\$20.00) Dollars for his services rendered herein, to be paid by the defendant and taxed as costs.

Came the defendant by counsel, and moved the Court on a written motion and grounds filed, to set aside the verdict of the Jury and the Judgment herein, and grant it a new trial, to which the plaintiff objects.

Upon motion of the defendant by counsel, it is ordered that the defendant be and is given one week in which to file additional grounds in support of said motion.

Said written Motion and Grounds for a New Trial filed on the 25th day of April, 1913, is as follows towit:

Jefferson Circuit Court, Common Pleas Branch, Division No. 1.

OHIO VALLEY TIE COMPANY, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Motion and Grounds for New Trial.

Defendant, Louisville & Nashville Railroad Company, moves the Court to vacate the verdict and grant it a new trial herein on the following grounds, to-wit:

1. The damages allowed by the verdict are excessive, appearing to have been given under the influence of passion or prejudice.
2. The verdict is not sustained by sufficient evidence, and is contrary to law.
3. The Court erred in giving to the Jury the instructions which it gave, and erred in the giving of each of said instructions.
4. The Court erred in refusing to give the instructions offered by defendant, and erred in its refusal as to each of such instructions thus offered.
5. The Court erred in admitting incompetent and irrelevant testimony, objected to by defendant at the time.
6. The Court erred in refusing to admit material and competent testimony offered by defendant.

BRUCE & BULLITT,

Att'ys for Def't.

At a Court held on the 1st day of May, 1913.

Came the defendant by counsel, and filed additional grounds in support of its motion for a new trial herein.

Said additional Grounds for a New Trial, filed on the 1st day of May, 1913, is as follows to-wit:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

OHIO VALLEY TIE COMPANY, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Additional Grounds for New Trial.

Defendant hereby assigns as further grounds for a new trial herein, the following to-wit:

1. To require defendant, against its will, to send its cars out of its possession and off of its tracks into the possession of another railroad company, and upon the tracks of another railroad company, to deprive defendant of its property without due process of law, contrary to the provisions of the constitution of the United States, and especially of the fourteenth amendment thereof; and the Court's instructions herein in directing the Jury that it could allow dam-

The testimony tended to prove all the allegations as above stated and the Jury, where there was contrariety of evidence, manifestly accepted the testimony which tended to support plaintiff's contention and they were the sole judges of the weight and credibility of the testimony.

89 The State Railroad Commission and the Interstate Commerce Commission had both held and ordered that cross-ties should be placed upon the lumber rate—that is, the same freight rates should be charged on cross-ties that were charged on lumber—instead of the rate on fifth class freight which was much higher and had been charged by the defendant company for many years, on ties.

On interstate shipments the defendant railroad company continued to charge plaintiff the fifth class freight rate although it was manifest from rulings of the Interstate Commerce Commission that such rate could not be maintained and that restitution of the excess of the fifth class rate over the lumber rate would be adjudged by the Commission against the railroad company and in favor of the plaintiff. These charges were enforced by the railroad company against the plaintiff, and the money was held until from time to time after a hearing by the Interstate Commerce Commission restitution was adjudged, and so plaintiff was kept out of large sums of money by the defendant. It appears from the testimony that the lumber rate from Bowling Green or Smiths Grove, as illustration, to Louisville is 8 cents per hundred pounds; under the fifth class rate which was charged by the defendant company on cross-ties shipped out of the State the company's charge for hauling from Bowling Green or Smiths Grove to Louisville was 32 cents, just four times the lumber rate. A cross-tie such as was used by the

90 Pennsylvania Railroad Company, which was a large buyer from plaintiff, weighed 200 pounds, so that the expense of hauling a cross-tie from Bowling Green or Smiths Grove to Louisville as an intra-state shipment was 16 cents; the company's proportion of an interstate haul from Bowling Green to Louisville was 64 cents; such cross-tie was worth 82 cents at Louisville; deducting 16 cents, the lumber rate, would leave 66 cents to the owner of the tie; deducting the fifth class rate, 64 cents, would leave 18 cents to the owner. These are the figures as to white oak ties as given in the testimony. It is testified that what is called the creosote tie, which is much used, is worth 55 cents in Louisville, and the railroad company's charge under the fifth class rate for hauling the tie to Louisville would be 64 cents, showing in effect a prohibitory rate for the white oak ties and a charge of more than the actual value of the creosote ties.

In explanation of the difference between the freight for ties intra-state and interstate, the testimony means clear that it was the policy of the defendant railroad company to discourage by its rate any shipment of ties beyond the State line. The president of the defendant company being asked: "Has it been your purpose, Mr. Smith, to prevent the movement of cross-ties off your lines?" answered, "That has been the effect and tendency to keep the rate on ties as high as

they could let them move out,—or if they moved out at all—slowly.”

It is not practical in determining the question before the Court to make an extensive review of this testimony, but it is clear to the Court that the Jury had before it testimony quite sufficient to conclude that the defendant's course towards the plaintiff had been to retard its shipment of ties by its freight rate, practically to prohibit the interstate traffic in ties and in doing this the Jury evidently concluded from the testimony that it had discriminated against the plaintiff as to furnishing cars, as to the refusal to accept Pennsylvania cars to transport the ties, as to its requirement of the plaintiff that the ties should be taken from the cars which they were brought to Louisville, and transferred to other places, so that plaintiff was delayed, required to incur expense, had its market for ties restricted, lost customers and in these ways was subjected not only to an interruption but serious impairment of its business, and substantial loss.

The only testimony as to the amount of damage to the large number of cross-ties that were injured by being left on the railroad right-of-way was the estimate made by Mr. Bush the President of the company. The estimate which he gave to the Jury was \$10,000.00 for such damage or loss; the Jury in itemizing the damage which it awarded fixed this at \$5,000.00, one-half of the only estimate that was made by any witness. If the jury is to be permitted to determine an amount of damage upon the testimony of an expert witness like Mr. Bush, although an interested witness, that being the only testimony upon the question, it seems to the Court that it cannot be said by the Court that this item is not supported by sufficient evidence or is so excessive as to indicate prejudice or passion by the Jury.

The \$50,000.00 damage to plaintiff's business and credit is the other item relied upon as unsupported by the evidence. In making comparison of his business before the difficulty which the record shows arose between the tie company and the railroad company, Mr. Bush testified that there was a profit in the tie company's business of \$27,000.00; during the next year when the controversy was alive and the obstructions to plaintiff's operations were manifest it appears from Mr. Bush's testimony that the loss of the plaintiff was \$28,000.00, a difference between the two years of \$55,000.00.

It is difficult to determine with any degree of accuracy or precision what is the loss to an individual or a corporation as a result of the impairment of financial standing, or interruption of the conduct of business; it is difficult to determine how soon a prosperous business so affected can or will recover from the actual and necessary results of such interruption; it is hard to find a definite rule under which a specific amount may be arrived at. It seems to the Court that the amount of \$50,000.00 is not more indefinite or uncertain than would be \$30,000.00 or \$10,000.00 upon the same item under the testimony, but the facts were all before the Jury; it is distinctly within the province of the Jury to estimate loss and damage

and in a case like this, it seems to the Court that the verdict of the Jury will not be disturbed unless it is so manifestly excessive as to indicate prejudice or passion on the part of the Jury.

93 Without a review of the authorities it may be safely stated that the rule for estimating damage is not the same always in a breach of contract as it is for a wrong done by one to another. This principle seems well established in *Kentucky Heating Company v. Hood*, 133 Ky. 383, *Gregory v. Slaughter*, 124 Ky. 345, and cases there cited. The principle seems further established by the cases that where loss is sustained by one as a result of the wilful and wrongful act of another, the same certainty and definiteness will not be required in the estimation of damage as is required in a breach of contract.

While the damage in this case seems large, it is evident that in limiting, interrupting, and restricting plaintiff's shipment of ties and in establishing and maintaining a prohibitory rate on cross-ties in interstate shipments, and thereby excluding as competitive purchasers who operate beyond the borders of the State, the defendant company not only caused loss to the plaintiff, but tended to decrease the price of ties in its own territory and thereby acquired profit to itself.

Upon the testimony as shown by the record, it seems to the Court that it would be an abuse of the Court's power to disturb the verdict, and therefore, defendant's motion for a new trial is overruled.

THOS. R. GORDON, *Judge*.

94 At a Court held on the 21st day of October, 1913.

Came the defendant by counsel, and prayed an appeal to the Court of Appeals of Kentucky, which is granted.

On the 22nd day of October, 1913, the following Supersedeas Bond was executed and filed in the Clerk's office, to-wit:

COMMONWEALTH OF KENTUCKY,
Jefferson County:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

No. 70975.

LOUISVILLE & NASHVILLE RAILROAD Co., Appellant,
against
OHIO VALLEY TIE COMPANY, Appellee.

Appeal from a Judgment of this Court Rendered on the 25th Day of April, 1913.

Whereas, said Appellant has taken an appeal from the judgment of this Court, rendered on the 25th day of April, 1913, against Louisville and Nashville Railroad Company, in favor of Appellee Ohio Valley Tie Co. for the sum of \$56,971.53 Fifty-six thousand, nine

red and Seventy one & 56/100 dollars, with interest & costs which judgment is in words and figures as follows:

It is therefore ordered and adjudged by the Court, that the plaintiff, Ohio Valley Tie Company recover of the defendant, Louisville & Nashville Railroad Company, the sum of Fifty-thousand nine hundred and seventy-one dollars, and fifty-six cents (\$56,971.56) being the amount assessed by the Jury in their verdict herein, with interest thereon at the rate of six percent per annum from April 25th, 1913, until paid, and its costs herein expended, for which it may have execution, and the Appellant desires to supersede said judgment.

Now, we, the National Surety Company, surety, do hereby covenant to and with the Appellee, Ohio Valley Tie Co., that the Appellant will pay to the Appellee, all costs and damages that shall be adjudged against the Appellant on the appeal, and also that they will satisfy and perform the said judgment in case it shall be affirmed, any judgment or order which the Court of Appeals of Kentucky may render, or order to be rendered by the inferior Court, not extending in amount of value the judgment aforesaid, and also pay damages, hire or damage which, during the pendency of the appeal, shall accrue on any part of the property of which the Appellee, is deprived out of possession by reason of the appeal.

In witness, our hands this 22nd day of October, 1913.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY,

By HELM BRUCE, *Atty.* [SEAL.]

NATIONAL SURETY COMPANY,

By J. MORTON MORRIS, [SEAL.]

Attorney-in-fact.

st:

LOUIS SUMMERS, *Clerk,*

by JNO. H. PAGE, *D. C.*

Thereupon the Clerk issued Supersedeas, and 1 Copy, which Supersedeas is as follows, to-wit:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

No. 70975.

LOUISVILLE & NASHVILLE RAILROAD Co., Appellant,

vs.

OHIO VALLEY TIE Co., Appellee.

Supersedeas.

do certify that an appeal has been granted by the Jefferson Circuit Court, Common Pleas Branch, Second Division, from a judgment rendered on the 25th day of April, 1913, in favor of Ohio Valley Tie Co., Appellee, against Louisville & Nashville Railroad Co., Appellant, for Fifty-six thousand nine hundred and sev-

enty-one & 56/100 dollars, with interest from April 25, 1913, costs, and that a supersedeas bond has been executed.

Therefore, the Appellee, and all others are commanded to st proceedings on the judgment above recited.

Witness my hand as Clerk of said Court, this 22nd day October, 1913.

LOUIS SUMMERS, *Clerk*,
By JNO. H. PAGE, *D. C.*

97 Said foregoing Supersedeas was returned by the Sher on the back thereof, as follows to-wit:

Came to hand Oct. 25, 1913, at 9.45 A. M.

Executed Oct. 27th, 1913, on Ohio Valley Tie Co. by deliveri a copy of the within summons to C. P. Bush, President of said co pany, he being chief officer found in this county at this time.

A. M. EMLER, *S. J. C.*,
By E. D. WATERS, *D. S.*

At a court held on the 29th day of November, 1913.

Upon motion of the defendant by counsel, it is ordered that G. Boone, official stenographic reporter for this court, make a full a ac-urate transcript of the testimony herein, and a carbon co thereof, and file same among the papers in this case.

Came the defendant by counsel, and tendered to the Court a B of Exceptions herein.

Came the defendant by counsel, and tendered to the Court Transcript of the Evidence herein, together with a carbon co thereof.

98 At a Court held on the 6th day of December, 1913, noti being waived, came the defendant by counsel, and tender to the Court a Bill of Exceptions herein, and the same having be duly examined, approved and signed by the Court, is ardered to and is filed and made a part of the record.

Came the defendant by counsel, and tendered to the Court Transcript of the Evidence together with a carbon copy thereof, at the same having been duly examined, approved, and signed by t Court, is ordered to be and is filed and made a part of the record.

Said Bill of Exceptions filed on the 6th day of December, 191 is as follows, to wit:

Jefferson Circuit Court, Common Pleas Branch, Division No. 2.

* OHIO VALLEY TIE COMPANY, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Bill of Exceptions.

Be it remembered that on April 21, 1913, the above styled acti came on for trial before Honorable Thomas R. Gordon, Judge; a

a Jury having been impaneled, the case was stated to the Jury for plaintiff by Mr. J. Van Norman, and for defendant by Mr. Helm Bruce. On motion of defendant, Mr. Geo. H. Boone, the official stenographer of the Court, was directed by the Court to make
99 a full report of the testimony therein, whereupon he did take full stenographic notes of such testimony, and on motion of defendant has caused a full and accurate transcript of the same to be made, which has been approved by the Court and filed among the papers of the case to be used in making up the Bill of Exceptions to the Court of Appeals. And said official reporter also caused a full and accurate carbon copy of said transcript of testimony to be made, which has likewise been filed with the papers in said action.

After the conclusion of the statements of the case, to the Jury by counsel, and the direction given to said official reporter, plaintiff introduced various witnesses who testified in its behalf, all as shown by the said Transcript of Testimony. In the course of the giving of such testimony, various writings were offered in evidence, and read or refused, all as set forth in full in said transcript.

During the giving of such testimony, various objections were made to the introduction of evidence, including that in writing, upon which rulings of the Court were had at the time, to which rulings exceptions were at the time taken by the party against whom each ruling was made, as shown by said transcript. And there were also various motions made to exclude certain testimony from the consideration of the Jury, upon which motions rulings were made by the Court, to which rulings, exceptions were at the time taken by the respective parties against whom each ruling was made, all as shown by said transcript.

100 At the conclusion of all the evidence offered by plaintiff, defendant moved the court to peremptorily instruct the Jury to find for defendant, to which motion, plaintiff objected, and the Court overruled said motion, to which ruling defendant at the time excepted.

And defendant further, at the conclusion of all of the evidence, offered by plaintiff, made the following motions for the exclusion of testimony, to-wit:

"1. Defendant moves the court to exclude and withdraw from the consideration of the Jury all testimony of the witness C. P. Bush, to the effect that on interstate shipments of cross-ties the L. & N. Railroad Company charged to and collected from the Ohio Valley Tie Company the rate fixed in its interstate tariff on 5th class freight; and all testimony to the effect that the rates thus charged and collected were higher than the rates charged on interstate shipments of lumber; and all testimony to the effect that the rates thus charged and collected on cross-ties were unreasonably high or unjust; because, under the Interstate Commerce Law of the United States, the Interstate Commerce Commission alone has the power to determine whether or not a rate charged and collected is unreasonable,
101 and the right to determine what damage, if any, has been caused to a shipper by the charging of an unreasonable rate, and the fixing of the amount to be paid by the railroad company to a shipper as damages on account of the charging of such unrea-

until the questions of the reasonableness of the rate and of the amount of the damage have been by Court submitted to and heard and determined by the Interstate Commerce Commission.)

"2. The Jury are instructed that they cannot allow plaintiff damages anything on account of the fact that defendant charged to and collected from it the rate upon 5th Class Freight for the shipment of cross-ties involved in the action of Ohio Valley Tie Co. v. L. & N. R. R. Co. in the Jefferson Circuit Court, wherein judgment was given in favor of plaintiff for certain alleged excess charges of freight, and which judgment was appealed to the Court of Appeals, and which case was afterwards carried to the Supreme Court of the United States, where it is now pending." (And at the time defendant offered this instruction No. 2, it said to the Court in writing: In Moving the Court to give the Jury this instruction, defendant relies upon the Federal Act to regulate commerce, approved Feb'y 4, 1887, and all amendments thereof, and insists that it is shown both by the record in the action referred to and in the present action that the shipments of cross-ties referred to in that action were interstate shipments, and that the question of the reasonableness of the rates therein involved had never been submitted to the Interstate Commerce Commission, nor determined by it. And that this Court has no jurisdiction to determine the question of the reasonableness of said rates, nor the question of the damages, if any, resulting from charging the same. And defendant also insists that plaintiff having recovered judgment on account of the charges of rates involved in that action, cannot further recover any additional sum herein, based on the same alleged wrongful acts.

"3. The Court instructs the Jury that defendant, Louisville & Nashville R. R. Co. had a right to keep its cars on its own tracks, and it was not therefore guilty of any wrong in refusing to allow its cars to go off its own tracks."

"4. The Court instructs the Jury that under the Federal Act to regulate commerce, the defendant Railroad Company was required by said Act to charge and to collect from all shippers of interstate traffic the rates of freight fixed by its tariff which was at the time of shipment on file and in effect with the Interstate Commerce Commission at Washington, and it would have been a violation of law to have charged or collected from any such shipper a rate different from that which, at the time of the shipment, was fixed by such railroad company's tariff, then on file with the Interstate Commerce Commission and in effect or to have connived at any arrangement whereby the payment of the rate fixed by such tariff should be evaded."

The Court refused each of said instructions, except so far as instruction No. 2 offered by defendant, was embodied in a ruling by the Court upon evidence hereinafter referred to. To the Court's refusal to give each or any of said instructions defendant at the time excepted.

The Court's Instructions.

Thereupon the Court gave to the Jury the following instructions, to the giving of each of which defendant at the time objected and excepted, to-wit:

"Gentlemen of the Jury, the Court instructs you:

No. 1. If you believe from the evidence in this case that the rates on cross-ties which were found to be unreasonable by the Interstate Commerce Commission by its order of April 8, 1912, were, to the extent said rates exceeded the rates then in force on lumber, wilfully and maliciously maintained by defendant with the intent to injure plaintiff's business of buying and selling ties, or with the intent to deter plaintiff from buying ties along the line of defendant's railroad, and that said rates which were charged plaintiff were, when so maintained, known by defendant to be unreasonable to said extent, or that defendant for the purpose of injuring plaintiff's said business or of deterring plaintiff from buying ties along the line of defendant's railroad wilfully and maliciously failed to furnish cars requested by plaintiff for the shipment of ties previously offered by plaintiff for shipment at times when it might, by the exercise of ordinary diligence, have furnished cars for said shipments, without interference with the rights of others, or wilfully and maliciously, with intent to injure plaintiff's said business, or with intent to deter plaintiff from buying ties along the line of the defendant's railroad, refused to accept the cars of another carrier tendered by plaintiff, if any were so tendered, for the shipment of ties when the defendant's own cars were not available for that purpose, and when defendant was accustomed, if it was so accustomed, to accept the cars of other carriers when tendered by other shippers under substantially similar circumstances and conditions, or that defendant wilfully and maliciously, with the intent to injure plaintiff's business of buying and selling ties or with the intent to deter plaintiff from buying ties along the line of defendant's railroad refused to permit ties shipped by plaintiff to Louisville in car loads to go forward to points on connecting lines without being unloaded, and required said ties to be transferred from the cars in or on which they reached Louisville over defendant's line to other cars for forwarding to points beyond Louisville on connecting lines when defendant was accustomed, if it was so accustomed, upon request therefor under substantially similar circumstances and conditions to permit cars which reached Louisville over its lines loaded with ties or other goods shipped by persons other than plaintiff to go forward to other such points without being unloaded, and that defendant by such acts or acts, if any were committed, did tie up a part of plaintiff's capital or did impair and injure plaintiff's business or credit, or did injure the cross-ties of plaintiff or subject plaintiff to expense as defined in Instruction No. 4 or cause it to lose time from its business of buying or selling ties; and if you further believe from the evidence that by said acts or any of them, if defendant

the provisions of the constitution of the United States, and especially of the fourteenth amendment thereof; and the Court's instructions herein in directing the Jury that it could allow damages against defendant on account of its refusal to permit its cars to go out of possession and off its tracks into the possession of another railroad company, and on the tracks of another railroad company, did deprive defendant of its property without due process of law, contrary to the said constitution."

The Court being sufficiently advised, overruled said motion for a new trial on October 18, 1913, to which ruling defendant at the time excepted.

The foregoing is a true bill of exceptions and contains all the grounds of exception.

Witness the signature of Thomas R. Gordon, the Judge before whom said action was tried, this 6th day of Dec. 1913.

THOS. R. GORDON, Judge.

114 STATE OF KENTUCKY,
County of Jefferson:

I, Louis Summers, Clerk of the Jefferson Circuit Court, do hereby certify that the foregoing One Hundred and Thirty-four (134) pages contain a full, true and complete Transcript of the record of the proceedings, in the action wherein Ohio Valley Tie Company is Plaintiff, and the Louisville & Nashville Railroad Company, is defendant, #70975, as the same appears of record and on file in said office.

Witness, Louis Summers, Clerk of said Court, this 16th day of January, 1914.

LOUIS SUMMERS,
Clerk Jefferson Circuit Court

115 Jefferson Circuit Court, Common Pleas Branch, Second
Division, April 21, 1913.

No. 70975.

OHIO VALLEY TIE COMPANY, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Bill of Evidence.

This cause coming on to be heard before the Honorable Thomas R. Gordon, Judge, and a jury being duly empaneled and sworn, the case was stated for plaintiff by J. Van Norman and for defendant by Helm Bruce.

Plaintiff's Witnesses.

C. P. BUSH was the first witness called on behalf of plaintiff, and being first duly sworn testified as follows, in response to questions by

Mr. BASKIN:

116 Q. Mr. Bush, what is your name?

A. C. P. Bush.

Q. Where do you live?

A. Louisville, Kentucky.

Q. What is your occupation or business?

A. President of the Ohio Valley Tie Company.

Q. How long have you been President of the Ohio Valley Tie Company?

A. Since October, 1910.

Q. What was your connection with that company before that time—before October, 1910?

A. I was treasurer and manager.

Q. How long have you been in the tie business in Louisville?

A. Since 1896.

Q. That is seventeen years ago?

A. Yes, sir; that is seventeen years ago.

Q. Have you been all that time with the Ohio Valley Tie Company?

A. The Ohio Valley Tie Company is the successor of the Dean Tie Company and the Dean Tie Company was the successor of the Moorman-Dean partnership.

Q. When was the Ohio Valley Tie Company organized or incorporated?

A. In 1903.

Q. Was it a new corporation or simply a change of name of another corporation?

117 A. It was a change of the name of the Dean Tie Company which was a corporation.

Defendant objects, and the court sustains the objection.

Q. Have you got your articles of incorporation?

A. Not here; I have at the office.

Q. You say the Ohio Valley Tie Company succeeded the Dean Tie Company. When was the Dean Tie Company organized?

A. In 1897.

Q. That is sixteen years ago?

A. Yes.

Q. Did you have any connection with the Dean Tie Company?

A. Yes, sir.

Q. What was that?

A. Treasurer and manager of the Dean Tie Company.

Q. Did the Dean Tie Company succeed any other concern or firm?

A. It succeeded the partnership known as the Moorman, Dean & Company.

Q. Did you have any interest in the partnership of Moorman, Dean & Company?

A. I purchased a fourth interest in the Moorman-Dean & Company in 1896.

Q. I will ask you to tell the jury the extent of the operations these three concerns, the Moorman, Dean & Company, the Dean Company and the Ohio Valley Tie Company?

118 Defendant objects and the court sustains the objection, which the plaintiff excepts.

Q. You have stated that the Ohio Valley Tie Company was organized in 1903.

The COURT: I will sustain an objection to that.

Mr. BRUCE: So far as the date is concerned, I do not object.

The COURT: State just when the articles of incorporation was dated. When was the Ohio Valley Tie Company incorporated?

The WITNESS: In 1903 the corporation was changed from the Dean Tie Company to—

Defendant objects and the court sustains the objection.

Q. When was the Ohio Valley Tie Company organized and began business?

A. 1903.

Q. What was the capital of the Ohio Valley Tie Company at that time?

A. \$50,000.

Q. Now, state the extent of the business done by the Ohio Valley Tie Company from the beginning up to the present fiscal year?

A. The Ohio Valley Tie Company did a gross business in 1903 and '4—its fiscal year entered on the first of September 119 each year—of about \$250,000. The business continued to grow and in the fiscal year ending September 1, 1911, which was the last fiscal year but one of our business, the gross business of the Ohio Valley Tie Company was \$750,000.

Q. How many ties did your company handle the first year after its organization and how many ties the year ending September 1911?

A. In the first year of its organization it handled about 250,000 ties.

Q. How many did it handle in the year ending September 1911?

A. 1,300,000 ties.

Q. What business did it do in number of ties and gross in amount of the next year; that is, the year from September 1, 1911, to September, 1912?

A. The gross business of \$600,000 and handled slightly under 1,000,000 ties.

Q. I will ask you whether the capital of the Ohio Valley Tie Company was increased from \$50,000 with which it was organized?

A. On the death of the president, Mr. A. M. McCracken, in 1911

the capital of the company was increased from \$50,000 common stock to \$150,000 common stock, and \$50,000 preferred stock. The preferred stock was given to Mrs. McCracken for her husband's interest in the business.

Q. In other words, the increase was from \$50,000 to \$200,000?

A. Yes, sir.

Q. How much of that increase represented new money put into the business?

A. The increase was entirely out of the earnings of the company with the exception of \$30,000 which I borrowed on my other stock and put into the business.

Q. What dividends, if any, were paid during that period out of the earnings of the Ohio Valley Tie Company?

A. In my mind, I didn't separate the dividends as to whether they were paid by the Dean Tie Company or by the Ohio Valley Tie Company, but I can state in a general way.

Q. Approximate it as near as you can?

A. Probably \$75,000 of dividends were paid.

Q. Were those dividends paid out of the earnings of the company?

A. Yes, sir.

Q. Were those earnings in addition to the increase or surplus—I mean were those dividends of \$75,000 in addition to the earnings that to make up the new capital except the \$30,000?

A. Yes, sir; all dividends were paid out of the earnings.

The COURT: And they were cash dividends, were they?

The WITNESS: Cash dividends. The increase in stocks, Judge, was stock dividends.

121 The COURT: Stock dividends were in addition to the \$75,000 cash dividends paid?

The WITNESS: Yes.

Q. Did or not the Ohio Valley Tie Company make profits or earnings which are represented by the increase of the capital stock except the \$30,000?

A. Its business was profitable with the exception of the last year. It never had a year in which it made a loss.

Q. That doesn't answer the question exactly. I want to know whether your stock dividends were fictitious dividends or whether or not you made earnings to represent that new stock?

A. We issued stock for money that had been earned and had not been distributed:

Q. Tell us about the profits made by the Ohio Valley Tie Company since its organization in 1903?

A. There was no year in that time in which the profits were not large. There was no year in that time in which the profits were less than \$10,000.

Q. What were your profits during the year ending September 1, 1911?

A. \$27,000.

Q. Was there or not a profit or a loss during the following year, that is, from September 1, 1911, to September 1, 1912?

A. We showed a loss of \$28,000 the second year—in the first year ending September 1, 1912.

Q. Add those two sums together for the convenience of the jury so as to see what the difference was between the earnings for the two years?

A. It made a difference of \$55,000.

Q. When did the Ohio Valley Tie Company commence to do business along the lines of the L. & N. Railroad Company?

A. In 1908.

Q. State to the jury generally what territory you began to go into at that time?

A. We started out in a small way on the Louisville & Nashville Railroad and purchased in the early part of our entrance to the territory near Louisville, between Louisville and Bowling Green, and after we began to operate in Tennessee and then began to operate extensively on the O. & N. Division of the L. & N. which extends from Russellville to Owensboro.

Q. Why did your company not do business on the L. & N. Road before 1906?

A. The real reason for my not starting on the L. & N. prior to 1908 was that up to that time I was with the Henderson Railroad and the Henderson Railroad was owned by the Louisville & Nashville Railroad Company and the Louisville & Nashville Railroad Company didn't want me to do the tie business on the railroad and couldn't do both.

Q. Did or not the question of freight rates have any influence in your going upon—

A. It would have been impossible for me—

Q. Have you any other reason—did you have any other reason for not going on the L. & N. line to do your tie business, I mean until after 1908?

Defendant objects and the court sustains the objection, to which the plaintiff excepts.

Q. When did you quit the service of what you call the Henderson Road?

A. In August, 1908.

Q. It was after that that you began to do business on the line of the Louisville & Nashville Railroad Company? Is that true?

A. Yes, sir.

Q. Were you at that time familiar with the rates prevailing on the L. & N. Railroad for hauling cross-ties?

A. I supposed when I started shipping ties on the L. & N. Railroad—

Defendant objects.

A. (Cont's.) I was familiar with the rates. I knew that the State Railroad Commission of Kentucky had ordered that the lumber rates be put in on the shipment of cross-ties on the L. & N. Railroad.

road and I relied upon that as the reason why the lumber rates would apply, and went into the business on their railroad on the supposition that the lumber rates applied on ties.

Q. When did the Kentucky Railroad Commissioners order the L. & N. Railroad Company to put ties on the lumber rate?

A. In 1905.

24 Q. Have you got that decision?

A. Yes, sir.

Q. Read that to the jury. Read so much of it as relates to the ties, it covers several other matters.

Mr. BRUCE: So far as the order is concerned the defendant has no objection, but does object to the opinion.

The COURT: The witness may read so much of the opinion as pertains to the shipments of the character under inquiry here.

Q. Just read so much of that as refers to the question of putting ties on the lumber rate?

Defendant objects to the reading of any part of the opinion of the Commission, and the court sustains the objection.

A. I will simply read that part which relates to the cross-ties.

The COURT: What is the style of that?

The WITNESS: The Norman Lumber Company against the Louisville & Nashville Railroad Company and others.

The witness reads as follows:

"First. As to the reasonableness of the rates upon cross-ties.

As to the first proposition it is contended by complainants
25 that the rates for the transportation of crossties should be no greater than the rate upon the common grade of lumber.

—yet nowhere do we find any attempt at a justification of this rate; indeed, counsel for the Louisville & Nashville Railroad Company very frankly admitted that there was no real justification for it.

In view of increased mileage of the railroads in Kentucky the crosstie industry has increased very considerably in this State. There are now 3,374 miles of railroad in the State. Upon each mile of railroad there is an average of from 2,850 to 3,000 crossties. It will be seen, therefore, that there are, in round numbers, about 10,000,000 crossties in this total mileage. The life of a crosstie is about seven years; consequently, it may be fairly assumed that the railroads in Kentucky alone consume annually in the neighborhood of 1,250,000 ties. It will be readily seen that the importance of this industry should not be underestimated.

A mere statement of these rates is sufficient argument in favor of their reduction. The Commission is of opinion that the rates on crossties should be no higher than the rates upon common lumber. It will not do to say that because these ties are a
6 necessity to the railroads they should be permitted to charge a rate for their transportation in excess of what may be deemed just and reasonable for the service performed.

It is therefore ordered, that the Louisville & Nashville Railroad Company, Illinois Central Railroad Company, Cincinnati, New Orleans & Texas Pacific Railway Company, Chesapeake & Ohio Railway Company, Lexington & Eastern Railway Company, Southern Railway Company in Kentucky, Louisville, Henderson & St. Louis Railway Company, and Louisville & Atlantic Railroad Company, and each of them, shall so revise their tariffs, classifications, rules and regulations as to make their rates on crossties no higher than their rates on lumber as fixed herein, and make no charge for the transportation of stakes or standards used in equipping their flat cars for the transportation of logs and lumber. It is also ordered that each and all of said railroad companies shall charge, collect and receive no higher rates for the transportation of the aforesaid commodities than the rates fixed herein, and all rates in excess thereof are declared to be extortionate, unjust and unreasonable. All tariff classifications, rules and regulations in conflict herewith are hereby

condemned. All other questions herein are reserved for future determination, and the Commission expressly reserves the power to revise, alter or amend the rates herein fixed or to revoke, modify, or extend this order, when deemed just and proper. It is further ordered that this opinion and order shall be entered upon the record book of the Commission at its office in Frankfort, and an attested copy thereof furnished by registered mail to an officer, agent, or employe of each of the above-named railroad companies, and to said complainants.

This December 7, 1905.

C. C. McCHORD, *Chairman*;
McD. FERGUSON,
A. T. SILER,
Railroad Commissioners.

A Copy.

Attest: C. C. McCHORD, *Chairman.*

Said opinion is filed herewith as Exhibit A.

128 Q. Mr. Bush, will you tell the jury what is understood by intra-state shipments?

A. An intra-state shipment is a shipment wholly within a State. A shipment from Bowling Green to Louisville is an intra-state shipment and from Bowling Green to Indianapolis is an inter-state shipment.

Q. Did or not the Louisville & Nashville Railroad Company comply with the order of the Kentucky Railroad Commission which you have just read there?

A. They did.

Q. And put the ties on the lumber rate?

A. Yes; they did.

Mr. BRUCE: You mean of course within Kentucky?

The WITNESS: Yes.

Q. Did or not the Louisville & Nashville Railroad Company take an appeal or resist in the court the order of the Kentucky Railroad Commission requiring them to put ties on the lumber rate?

A. They did not; they issued a tariff in accordance with that order.

Q. I will ask you whether or not the L. & N. Railroad Company put into effect the same lumber rates on ties where the shipments are inter-state shipments?

A. So far as I knew, they did; because when we began to do business on the L. & N., all shipments moved at lumber rates, whether intra-state shipments or inter-state shipments, and continued to do so for nearly two years.

Q. Were you at that time, in 1908 I believe you said—were you at that time shipping ties both on intra-state shipments and interstate shipments?

A. Yes, sir; in fact, the bulk of our ties at that time were interstate shipments.

Q. About how many ties were shipped in interstate shipments in 1908 and 1909 from Kentucky to other States?

A. 2,500 carloads—2,500 to 3,000 carloads.

Q. Have you got any bills of lading issued by the L. & N. Railroad Company to show that fact?

A. A large number.

Q. Produce them please and file one or two as samples.

A. We haven't undertaken to take out all the cars, but we have taken out cars covering the period.

Q. Just read one or two of those.

The witness hands papers to counsel for defendant.

Q. Don't read all the details of the bills of lading, but just the points of destination of the shipments, the origin and destination and what the shipment contained.

A. I have here a bill of lading covering car L. & N. 90863 shipped on the first of September, 1910, to the Ohio Valley Tie Company at Louisville, Kentucky—no, it was shipped to the N. Y. C. & St. L.

Railway Company care of the Ohio Valley Tie Company at Louisville, Kentucky. On September 2nd we wrote to the L. & N. this letter:

The witness reads the letter as follows:

"September 2, 1910.

Cashier's Office.

Mr. H. G. Dempf, Agent, L. & N. R. R., Louisville, Ky.

DEAR SIR: Car L. & N. #90863, Ties, from Nelsonville, Ky.

The above shipment consigned to "N. Y. C. & St. L. Railway, c/o Ohio Valley Tie Co., Louisville, Ky.," you will please forward to the N. Y. C. & St. L. Ry., c/o A. W. Johnston, Gen. Mgr., Erie, Pa.,

via Monon Route to South Wanatah, Ind., and N. Y. C. & St. L. to destination.

Let all charges follow car.

Yours truly,

By OHIO VALLEY TIE CO.,
"

Said letter is filed herewith as Exhibit B.

Said bill of lading is filed herewith as Exhibit B-1, and is in words and figures as follows:

(Here follows Exhibit "B No. 1," marked page 131.)



Arrangement of colors and forms in manuscript, on Straight shipments: (1) Shipping Order [white]; (2) Bill of Lading [white]; (3) Memorandum [white]

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

STRAIGHT BILL OF LADING—ORIGINAL—NOT NEGOTIABLE.

Shipper's No.

Agent's No.

RECEIVED, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading.

at Nelsonville Ky 9/1
from Ohio Valley Trust Co

1910

from White Valley Ltd the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof), and which are agreed to by the shipper and accepted for himself and his consignee.

The Rate of Freight from Wilmington

The Rate of Freight from

to Louisville

Per Cents per 100 Lbs.

to <u>Lonsdale</u>												<u>66m</u> Cents per 100 Lbs.												Per Barrel		If Special																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																		
M. & S. 1st Class	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF	IF</

(Mail Address--Not for purposes of Delivery.)

Consigned to N.Y. C. & P. Ry. Co. Ohio Valley Pk. Co.

Destination, London

State of

Key

County of _____

Route,

Car Initial

22.2

Car No. 90,863

[illegible]

J. P. Miller

Agent.

Per.

CONDITIONS

Sec. 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as herein-after provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss, theft or damage thereto or delay, caused by the act or omission of the public enemy, the authority of law, or the act or default of the shipper or owner, or for differences in the weights of grain, seed, or other commodities or weight, or for shrinkage or discrepancies in elevator weights. For loss, damage, or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at point of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession, the carrier or party in possession shall not be liable for loss, damage, or delay of the property in possession thereof and shall not be liable for loss, damage, or delay of the shipment, owner, or property on a transfer or resulting from a defect of fire in the property or from holes or rakes; or for country damage on cotton. When in accordance with general custom, on account of the nature of the property, or when as the result of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence.

In case of quarantining the goods they be dislocated at risk and expenses owners into quarantine depot or elsewhere, as required by quarantine regulations, or authorities, or for the carrier's dispatch, or as nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when goods are put to shipping point, namely, "fresh hold ways." Quarantine expenses of whatever nature or kind upon or in respect to goods shall be borne by the owner of the goods or be a lien thereon. The carriers shall not be liable for loss or damage occasioned by fumigation or disinfection or other act required by carrier's officers, crew, agents or employees, nor for detention, loss or damage of any kind occasioned by quarantine or the enforcement thereof.

Sec. 2. In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law.

Sec. 3. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or other sale than with reasonable dispatch, unless by specific agreement entered between. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price if so stated on the invoice) including the freight charges, if prepayable, at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification of tariffs upon which the rate is based. In any of these cases, the maximum amount of recovery shall be the value so stated, provided that events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.

Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable.

Any carrier or party liable on account of loss or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance.

Sec. 4. All property shall be subject to necessary cooperate and baling a owner's cost. Each carrier over whose route cotton is to be transported here

under shall be the preference, at the same cost and title, of compensating the same owner for master convenience in handling or forwarding, and shall not be held responsible for detention or unavoidable delays in processing such compensation. Grain in bulk condition to a point where there is a railroad, public, or licensed elevator may (unless otherwise expressly noted herein, and then it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery at the carrier's option, subject to a reasonable charge for storage and to certain responsibilities as warehouseman only, or may be, at the option of the carrier, and subject to the payment of a reasonable charge for storage, and the expense of loading and unloading, placed in a truck and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The owner for the use of trailers after the car has been held forty-eight hours or car for the use of trailers after the car has been held forty-eight hours (excluding on legal holidays), for loading or unloading, and may add such charges to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as limiting the time allowed by law or as setting aside any local rule affecting car service or storage.

Property delivered to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after delivery, and shall be at risk of owner whether or not the property is unloaded from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from railcars, or until loaded into and after unloaded from vessels.

Sec. 6. No carrier will carry or be liable in any way for any documents, speeds, or for any articles of extraordinary value not specifically rated in the published classification or tariff, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 7. Every party, whether principal or agent, shipping explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 8. The owner or consignee shall pay the freight, and average if any, and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Sec. 9. Except in case of diversion from rail to water route, which is provided for in section 8 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations, and exemptions provided by statute and to the conditions contained in the bill of lading and other documents with such statutes or such bills of lading and subject also to the condition that no such carrier shall be liable for loss of or damage resulting from the perils of the lakes, seas, or other waters; or from vermin, leakage, chafing, breakers, bees, frost, wet, explosion, bursting of boilers, breakage of hatches, or any latent defect in hull, machinery, or appliances; whether existing prior to, at the time of, or after sailing; or unseaworthiness; or from collision, stranding, or other accidents or navigation, or from prolongation of voyage. And any vessel carrying any or all of the property herein provided shall have the obligation to discharge the same as soon as it may be lawfully transferred to land, and to deliver the same and discharging goods at any time, and assuage the same in different, and to devote for the purposes of saving life or property, and such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry such property upon deck.

The term "water carriage" in this section shall not be construed as including lightage across rivers or in lake or other harbors when performed by the rail carrier, and the liability for such lightage shall be governed by the other sections of this instrument.

Sec. 1. Any alteration, addition or erasure in this bill or having written thereon, shall be made without an indorsement thereof, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

NI

STRAIGHT BILL OF LADING—ORIGINAL—NOT NEGOTIABLE.

notwithstanding subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading.

Order _____ 5/7

at Chicago, Ill. the property described below, in apparent good order, except as noted from contents of packages unknown, marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof), and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from.

...is in Cents per 100 Lbs.

[illegible]

Consigned to N.Y. C. & L. Ry. Co. J. A. W. Johnson

Destination, Ernie Fay State of Washington County of King

Destination, One Car State of Ohio Car No. 13,543
via C. & G. to South Mansfield
 Route, " N. Y. C. & St. L. to Erie Car Initial GN v. S. L.

No. PACKAGES	DESCRIPTION OF ARTICLES AND SPECIAL MARKS	WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN
343	Tie & Co.			
	S.L. & Co.			
	Exhibit "C" No. 1			
	G.P. Boone			
	Official Stamp			

(Copy)

(Copy)

Per
J. C. Payner
M. C. W.

Agent.

Sec. 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as herein-after provided.

[illegible]

In case quarantining the goods may be attended at a risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations, or authorities, or for the carrier's despatch, or as measures available point in the carrier's judgment, and in such cases the goods may be retained by owner's agent and risk to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to goods shall be borne by the owners of the goods or be a lien thereon. The carriers shall not be liable for loss or damage occasioned by fumigation or disinfection of goods, or by any kind of occurrence by quarantine or the enforcement thereof.

Sec. 2. In leasing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law.

Sec. 3. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch, unless by specific agreement in writing between the carrier and the owner. In cases of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the points and invoice prices, if any), to be transported, including the freight charges. If prepaid at the time of shipment under this bill of lading, unless a lower value has been stated in writing by the shipper or has been agreed upon or is determined by the classification or tariff upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such compensation, whether or not such loss or damage occurs from negligence.

Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable.

Any carrier or party liable on account of loss or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance.

Sec. 4. All property shall be subject to necessary co-operation and bailing at owner's cost. Each carrier over whose route cotton is to be transported here-

under shall bring the refrigerator, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deterioration or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator may (unless otherwise expressly noted herein, and then if it is not prominently unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 8. The property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to the carrier's inability as without-receipt owner of any property stored at the carrier's warehouse as the owner's property, and subject to the owner's risk and liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The owner may make a reasonable charge for the detention of any vehicle or trailer for the use of tractors after the car has been held forty-eight hours (excluding the day of seizure), for loading or unloading, and may add such charges to all other charges hereinafter and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Properly destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner at which it is delivered, or of consignee or until loaded into cars or *vehicles*, and when unloaded from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to, and after they are detached from trains, or until loaded into and after unloaded from vessels.

Sec. 6. No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specially rated in the published classification or tariff, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 7. Every party, whether principal or agent, shipper, consignee or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehouse at owner's risk and expense or destroyed without compensation.

Sec. 8. The owner of consignments shall pay the freight, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Sec. 9. Except in case of diversion from rail to water route, which is provided for in section 3 hereof, if all or any part of said property is carried by water over any public waterway, such water carriage shall be performed subject to the same regulations, limitations, and exemptions provided by statute and to the conditions established in the bill of lading not inconsistent with such statutes or this section, and subject also to the conditions that such carrier or party in possession shall

[illegible]

The term "water carriage" in this section shall not be construed as including lightering across rivers or in lake or other harbors when performed by the rail carrier, and the liability for such lightering shall be governed by the other sections of this instrument.

Sec. 10. Any alteration, addition or erasure in this bill of lading, which shall be made without an indorsement thereof hereon signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

32 A. (cont'd). In other words, we gave the Louisville & Nashville Railroad Company full notice that we intended to make interstate shipments of this car, they charged us only the lumber rate for moving it to Louisville.

Defendant objects to the last statement of the witness and the court sustains the objection.

A. (cont'd). I have here bill of lading shipped from Lewisburg, Kentucky billed to the New York, Chicago & St. Louis Railroad Company care of A. W. Johnson, Erie, Pennsylvania. The car was actually billed through to destination from Lewisburg and moved as shown by this expense bill to Louisville on the lumber rate.

Said bill of lading is filed herewith as Exhibit C-1.

Said Expense Bill is filed herewith as Exhibit C-2.

(Here follows Exhibit "C No. 2," marked page 133.)

134 N. Y. C. & St. L. Ry., c/o A. W. Johnson:

So WAU. STATION, Ap'l 10, 1910.

Via —.

To Chicago, Indianapolis & Louisville Railway Co., Dr.

Monon Route.

Pro. 17.

Erie, Pa.

For Freight and charges on the following described property:

	Weight.	Freight and charges.
Consignor, O. V. T. Co., 343 Cross Ties....	50,900	79 91
Where from, Lewisburg.		
Date of W. B., Ap'l 8-'10.		
Way-Bill No., 712.		
Car Initial, G. H. S. A.		
Car No., 13543.		
Transferred from Car, —.		
Cartage, —.		
Total Charges, —.		

O. K., S. L. C.

E. E. STIPP,
Signature.

Exhibit "C. No. 2."
(Copy.)

G. H. BOONE,
Official Steno.

[Written across face in red ink:]

8 ft. Oak.

L. & N.....	10
Bridge.	1
Monon	4.7
	<hr/> 15.7

Lewisburg, Ky.
4-5-10.

135 A. (cont'd). The date of the expense bill is five days later,
April 10th.

Mr. BRUCE: Whose expense bill is that?

The WITNESS: Chicago, Indianapolis and Louisville, which took
the car to the Nickel Plate. This is the expense bill which the Nickel
Plate Railroad returned to us in settling for the car, deducting the
charge.

The COURT: Does the number identify the car?

The WITNESS: Yes, sir; the number identifies the car; it is the tie car number.

Q. Of the 2,500 cars which were shipped over the L. & N. to interstate points, about how many of them were first consigned to Louisville and forwarded and about how many of them were consigned from points in Kentucky to points in other States within the period from 1908 to—well, the next two years?

A. A large number of cars—much the larger number were shipped through to destination.

Defendant objects and the court sustains the objection, to which the plaintiff excepts.

A. (cont'd). Part of that record will have to be proved by our books. Those we can show to counsel. Part of the bills of lading, the bills of lading for the 1908 business and part of the 1909 were not kept, but the movements of it is shown on our books and the amount of freight charged is all shown on our books.

Q. I will ask you whether or not on those 2,500 cars being interstate shipments, whether the ties went through on the lumber rate or the fifth class rate?

A. The lumber rate. The lumber rate until February 1910. In February, 1910, we received from the Nickel Plate Railroad settlement for a car of ties shipped, on which there was an overcharge of \$131 caused by having assessed the fifth class rate on that car. That was the first car, in 1910, on which the high rate had been charged.

The COURT: What date?

The WITNESS: In February, 1910.

Q. Where was that, what you call an overcharge of \$131, between what points?

A. From the point on which the car was shipped on the L. & N. Railroad to Louisville, Kentucky.

The COURT: Have you the bill for that particular one? Is that the one you have exhibited?

The WITNESS: No, sir; that is another—I will come later to it; it is in a claim which we filed against the L. & N. Railroad Company. I have it in my file here. Of course that expense bill in that case is in the L. & N. offices for the reason that they refunded that money to us and took up our papers. That would have to be produced from their office.

Q. Mr. Bush, I will ask you this question: If prior to February, 1910, the L. & N. Railroad Company charged on any cars, interstate shipment, any other rate than the lumber rate forties?

A. No, sir.

Q. You spoke of 1910 when the first charge was made on the fifth class rate for which you make claim. Where were your cars—what was the destination of that car? Did you give it?

A. Erie, Pennsylvania.

Q. Where were you shipping—were you shipping to the Pennsylvania Company at that time?

A. Yes, sir.

Q. Where were you consigning those cars to? . To what point?

A. Prior to the latter part of 1909, we consigned the Pennsylvania cars and the Big Four cars to Jeffersonville, for the reason that the Pennsylvania and Big Four required us to pay bridge toll, and as a matter of form the cars were consigned to them at Jeffersonville. In the contract made in the fall of 1909, we asked that they eliminate the bridge toll from our contract and allow us Louisville delivery. They did this, and from that time on all shipments to those companies were billed to Louisville proper, except that we continued to ship what are called creosote ties, which are intended to be creosoted before being used, over to Shirley, Indiana, where a plant was in operation. That part was consigned to Shirley, Indiana. Then, after that we delivered the ties which came to Louisville proper, at Louisville.

Q. On May 10, 1910, or up to that time, how did your shipments, interstate shipments, move, as fifth-class rate or on the lumber rate?

A. After we received the expense bill for this car showing the high rate, we made a claim against the L. & N. Railroad Company in the ordinary course of business, thinking a mistake had been made on their part, in making this overcharge, and from that time until May, 1910, all the other cars moved at the lumber rate, but in August, 1910, we began to receive settlements from the Nickel Plate Road showing they were assessing the higher rate on all shipments, and on sixty-seven cars which we settled for at that time, there was an overcharge of \$6,700—there was an overcharge of \$8,100.

Q. How did this charging the fifth-class rate affect you at that time?

A. It converted what was a fine profit in the business to an absolute loss—an immense loss.

The COURT: What was the difference between the lumber rate and the fifth class rate.

The WITNESS: Take a point like Smith's Grove, Kentucky, the lumber rate from Smith's Grove, Kentucky, is eight cents.

139 Q. Eight cents a what?

A. Per 100 pounds.

Q. Where to?

A. To Louisville, Kentucky. The cross-tie rate—that is called the fifth class rate, the cross-tie rate—is 32 cents per 100 pounds, or four times in excess.

Q. How much per tie was that before?

A. A tie weighs 200 pounds, such a tie as the Pennsylvania Railroad Company uses. It weighs 200 pounds and coming in at the lumber rate it used to be 16 cents freight, but coming in as the fifth class rate it would be 64 cents freight.

Q. When you discovered that you had been charged \$7,900, as you stated, more on the 57 cars shipped to the Nickel Plate, than the lumber rate, what did you do about it?

A. I filed claims for such cars as had come in against—I was mistaken in saying the first settlement I knew of about the amount of overcharge. The first statement showed overcharges about \$1,700—

the first settlement from the Nickel Plate—and we filed claims against the L. & N. Railroad Company for that \$1,700.

Q. Then, what did the second settlement show?

A. When we received the second settlement showing all cars were now being assessed at the higher rate, we changed our method of doing business. We shipped those cars to the Ohio Valley Tie Company, Louisville, Kentucky, in care of the Big Four Railroad Company and paid the L. & N. Railroad Company freight up to Louisville at the lumber rate and reconsigned the cars to the Nickel

140 Plate. Before doing that we wrote to the L. & N. Railroad Company advising that we were going to do that and asked if it was satisfactory and had a letter from the agent here to the effect that it would be satisfactory.

Defendant objects to the reference to the letter and the court sustains the objection.

Q. Read that letter—read your letter to the L. & N. Railroad Company and the answer.

Witness reads letter as follows:

“LOUISVILLE, KY., July 27, 1911.

Mr. J. P. Fulwiler, Agent, L. & N., 1st & Water Sts., Louisville, Ky.

DEAR SIR: We are about to begin the shipment of several carloads of cross-ties from points on your Line to Louisville. These ties will be consigned to Ohio Valley Tie Company, Big Four delivery, Louisville, Ky., and upon arrival here we wish you would send us notice of your freight charges so that we can send you our check for the same, instead of having you bill against the Big Four for L. & N. charges.”

Said letter is filed herewith as Exhibit D.

141 “Ohio Valley Tie Co., City, Columbia Bldg.

GENTLEMEN: Your letter July 27th in regard to settlement of freight charges on cross-ties consigned to your company, received.”

Said letter is filed herewith as Exhibit E.

Q. What was done in pursuance of that when the cars arrived at Louisville? What was done with the cars?

A. As fast as the cars arrived, we received a postal card notice from the agent of the L. & N. Railroad Company giving the amount of freight and we sent our check in payment of the freight to the L. & N. Railroad Company's agent.

Q. Then, what became of the cars?

A. The cars were reconsigned to the New York, Chicago & St. Louis Railway Company at Erie, Pennsylvania.

Q. And the check covered what rate, the fifth class rate or the lumber rate?

A. The lumber rate.

Q. You have stated that in excess of \$7,900—that is to say, the

difference between the fifth class rate and the lumber rate on fifty seven cars shipped to the Nickel Plate, I will ask you what did your company do about that excess? Did they recover that?

142 A. We made a claim in the ordinary course against the L. & N. Railroad Company for the overcharge on these ties.

Q. Were those claims paid or not?

A. They paid part of them; they paid \$1,700 of them.

Q. When was that?

A. They paid the claim October 13, 1910.

Q. That is, \$1,700 of it. What became of the other \$6,200 the claim?

A. They never paid that until we took the case to the Interstate Commerce Commission and had the money refunded as the result of an order from the Interstate Commerce Commission.

Q. Did you or not receive any letter in regard to that \$1,700 from Mr. Seger, the Freight Claim Agent of the L. & N. Railroad Company?

A. We had a large amount of correspondence with Mr. Seger in regard to this.

Q. Don't tell what was in the letter. I want to know if you had that letter?

A. Yes.

Q. Did a correspondence ensue from that letter?

A. Yes, sir.

Q. You have that?

A. Yes, sir.

Q. Show it to Mr. Bruce, please, and read it to the jury.

The witness hands the correspondence to counsel for defendant.

143 Q. In regard to that \$6,200 balance of that \$7,900 claim you say you filed a claim against the L. & N. Railroad Company before the Interstate Commerce Commission for that?

A. Yes, sir; we filed a claim.

Q. Was there a trial before the Interstate Commerce Commission?

A. A trial was held before a representative of the Interstate Commerce Commission in Louisville.

Q. Did the L. & N. Railroad Company appear at that hearing and make any defense?

A. They did not.

Q. What was the finding, if any, of the Commission, about the \$6,200?

A. The Commission ordered the refunding of the \$6,200 and ordered the L. & N. Railroad Company to change the rate from the points affected by that decision, from the fifth class rate to the lumber rate.

Q. How long were you kept out of your money?

A. Two years.

Q. What was the next step that occurred in your controversy with the L. & N. Railroad Company?

A. The next step that occurred was when they notified us, or

received notice as the result of expense bills which we received from the Pennsylvania Railroad Company that they were charging the fifty-class rate on cross-ties billed to the Big Four at 144 Louisville and to the Pennsylvania at Louisville, and on the first settlement which we received from them on eighty-nine cars, there was an overcharge of \$8,100.

Q. Did you continue to make shipments both intra and interstate shipments, from points on the L. & N. Railroad Company's lines after that claim was made, of ties intended for the Nickel Plate Road?

A. No, sir.

Q. Why did you not continue to make shipments that way?

A. As soon as we found that they were charging us the high freight rate on all cars to the Nickel Plate, we went out of business with the Nickel Plate for the reason that we could not afford to pay \$100 a car overcharge even though we knew in two years we would get it back. Our capital would all be gone in a little while. I want to correct that, to this extent: We had a contract with the Nickel Plate Railroad, an unfilled contract, and we continued to ship ties on that contract at the high rate until it was filled, with the result that between \$3,000 and \$4,000 more of our money was taken away in this way, which money is still in the hands of the L. & N. Railroad Company.

Q. You stated from the time you began business on the L. & N. Railroad in the fall of 1908 until the time the L. & N. began to fix the higher rate in the summer of 1911, that you built up a large business on the lines of these roads. Please state the magnitude of the business, not your business everywhere, but your business in that locality?

145 A. Our business had grown until the year ending September 1, 1912, we shipped 245,000 ties off of that part of the L. & N. on which they assessed the high freight rate. Understand, in Eastern Kentucky, in the Central Kentucky Division of the L. & N., they have never assessed these high rates except to Louisville. To Cincinnati they have for years had in effect lumber rates on shipments of cross-ties that we don't count in, showing 245,000 ties. We don't count in the ties that could be shipped to Cincinnati on the lumber rate from points in Eastern Kentucky.

Q. How many ties have you shipped then, during the years 1908 and 1909 off of the lines of the L. & N. Road?

A. I think 45,000 ties in the first year.

Q. I will ask you about the year 1908—the fall of 1908 and the whole of the year 1909?

A. 45,000 ties.

Q. How much, in your fiscal year from September, 1909, to September, 1910?

A. In the first year of our business on that part of the L. & N. on which the fifth class rate was afterwards set, we shipped, 64,600 ties.

The COURT: What are the dates?

The WITNESS: September 1, 1908, to September 1, 1909, and

from September 1, 1909, to September 1, 1910, 188,000
146 ties; September 1, 1910, to September 1, 1911, 245,000 ties.

Q. You testified that your controversy began with the L. & N. Railroad Company in the summer of 1911. State what ties you shipped from September, 1911, to September, 1912?

A. 172,000.

Q. How much was that falling off from the previous year?

A. 78,000 ties.

Q. At that time, after the controversy began with the L. & N. Railroad Company, had you any outstanding contracts for ties on hand?

A. We had at that time about \$75,000 invested in timbers and ties, advanced on contracts on that part of the L. & N. Railroad.

Q. Was it or not necessary for you to get that capital or timber out in order to save yourselves?

A. Oh, yes; the ties have to be shipped promptly after they are made.

Q. D you know why the L. & N. charged the fifth class rate on shipments of cross-ties made to the Big Four and Pennsylvania at Louisville when its public tariff showed the lumber rate as applicable to intrastate shipments?

A. They claim, I think, that those ties that were billed to the roads at Louisville, although our contracts for delivery ended at Louisville, the fact that the Pennsylvania lines extended north, across
147 the river, and the Big Four lines extended north, across the river, and the Big Four lines extended north across the river, they considered those shipments to be interstate shipments and therefore subject to the high rate.

Q. Did you or not have a lot of cars to arrive here in August, 1911, over the L. & N. Road and a controversy arose about whether or not they should be delivered?

A. They refused to deliver the cars except on payment of the high freight rate and we refused to pay the high freight rate.

Q. How many cars were there?

A. Eighty-nine cars.

Q. Did you or not then bring a suit in the Jefferson Circuit Court—an injunction?

A. We brought suit of injunction in the Jefferson County Circuit Court and got an order from the court requiring them to deliver the cars to us.

Q. Did they appeal from that order?

A. They did not appeal.

Defendant objects to the statement of the witness with reference to the order, and the court sustains the objection.

Q. In regard to an appeal, did the L. & N. Railroad Company take any steps at all about appealing to the Judges of the Court of Appeals from that judgment?

A. We received notice that they would appeal, but afterwards received notice that they would not appeal.

148 Q. Were the cars or not delivered after that injunction?

A. The cars were delivered, but they charged the high freight rate on them.

Q. What did they amount to?

A. \$8,100.

Q. What did you do about that \$8,100 overcharge?

A. We brought suit for the money in the Jefferson Circuit Court.

Q. Did the L. & N. Railroad Company defend that suit?

A. Yes, sir.

Q. Did you get a judgment?

A. We got a judgment.

Defendant objects and the court sustains the objection, to which the plaintiff excepts.

The plaintiff offers in evidence the record in the case of the Ohio Valley Tie Company against the Louisville & Nashville Railroad Company in the Jefferson Circuit Court, No. 70,069.

Defendant objects, but the court overrules the objection, to which the defendant excepts.

By agreement of counsel, the record may be considered
149 as read to the jury.

Stipulation.

It is stipulated that after the judgment was entered in the case referred to in the Jefferson Circuit Court, appeal was taken by the Louisville & Nashville Railroad Company to the Court of Appeals of Kentucky where the judgment was affirmed, after which a writ of error was prosecuted in the Supreme Court of the United States from the Court of Appeals of Kentucky, and the judgment of the Court of Appeals of Kentucky was superseded, and the case is now pending in the Supreme Court of the United States.

Q. Did or not the L. & N. Railroad Company require any other shippers of ties to bring suit in order to recover the difference between the lumber rate and the fifth class rate when the fifth class rate had been charged on interstate shipments?

A. Not to my knowledge.

Q. Do you know anything of a shipment of that sort by the Nashville Tie Company?

The WITNESS: I would like to have that last question read.

150 The reporter reads the question as follows:

Q. Did or not the L. & N. Railroad Company require any other shippers of ties to bring suit in order to recover the difference between the lumber rate and the fifth class rate when the fifth class rate had been charged on interstate shipments?

A. I think other claims have been prosecuted against them on shipments—actual interstate shipments. So far as I know our company was the only one in which the question was involved as to whether a shipment to Louisville, Kentucky, for the Big Four or the Pennsylvania was an interstate shipment or not.

Q. That is what I mean. Do you know anything about a case of the Nashville Tie Company having shipped ties?

A. The Nashville Tie Company shipped ties to the Monon in ex-

actly the same method that we shipped ties to the Pennsylvania Railroad. Instead of requiring them to bring suit——

Mr. BRUCE: Are you stating what you know or what you have been told?

The WITNESS: I know; I have the figures and the record here. I made not only the record but I made trips for the tie company——

Defendant objects and the court directs the witness to state only what he knows or heard himself.

A. (cont'd). The Nashville Tie Company wrote me——

Defendant objects and the court sustains the objection.

151 Q. Do you know whether or not they made a refund on the difference between the fifth class rate and the lumber rate on shipments of ties made by the Nashville Tie Company in interstate shipments?

Defendant objects, and the court sustains the objection.

Q. Do you know of your own knowledge that the L. & N. Railroad Company made a refund for the difference in freight between the fifth class rate and the lumber rate on shipments of ties in interstate shipments, of your own knowledge?

A. I didn't actually see the checks; I saw the record of it all but I didn't see the check.

The COURT: I will sustain an objection to that.

A. (cont'd). I was familiar with it to this extent: I went to the L. & N. and had a conversation with the officials in regard to it.

Q. What did they say, the officials of the L. & N. Railroad Company?

A. They said that inasmuch as they considered the car going north for the use of the Monon Railroad, that they would assess the fifth class rate.

Q. Did you have any conversation with them about refunding the difference between the fifth class rate?

A. That is what I went for, to try to get them to refund the money.

152 Q. What did they say?

A. They refused to do it.

Q. To you?

A. To me.

Q. You don't know what they did to the Nashville Tie Company?

A. I do know, but not in the way the Judge wants it.

Q. You have said that the L. & N. obeyed the injunction so far as deliveries of the cars was concerned. What do you mean by that?

A. I mean they continued to deliver cars billed by us to the Pennsylvania Railroad Company, charging only the lumber rate on the cars, but that they required that all cars be transferred at Louisville.

Q. What do you mean by cars being transferred at Louisville?

A. They required before they would set a car over to the Pennsylvania Railroad Company.

vania track, an agreement on the part of the Pennsylvania that they would take the ties out of the car in which the L. & N. brought the ties into Louisville, and return the empty car to them.

Q. What did they do with the ties when they took them out? Did they throw them on the ground?

A. They usually transferred them to a Pennsylvania car.

Q. By transferring a car, you mean transferring the ties from one car to another car?

A. Yes, sir; it is usually spoken of as transferring a car, but it means transferring the contents of a car.

Q. How did you get that information that that requirement was made? From whom?

A. From the Pennsylvania officials.

Q. Mr. Bush, have you the—is the Louisville & Nashville Railroad Company a member of the American Railway Association?

A. I assume so; all of the railroads are.

Defendant objects and the court sustains the objection, to which the plaintiff excepts.

Q. I will ask you if you have got the rules of the American Railway Association in regard to transferring contents of cars before they go forward?

A. These are the rules which govern——

Defendant objects and the court sustains the objection, to which the plaintiff excepts.

Q. Did or not the L. & N. Railroad Company require the cars to be unloaded and the contents placed into other cars? That is to say, the cars in which they would bring the ties to Louisville, did they require those ties to be unloaded and put into other cars before they would let the car go on the switch of the Pennsylvania and other connecting lines?

A. Yes, sir.

Mr. BRUCE: Do you mean cars consigned to Louisville?

Mr. BASKIN: Yes; cars consigned to Louisville.

Q. What effect did that have on your business?

A. It put upon us the burden of transferring them.

The COURT: Do you mean transferring the ties?

The WITNESS: The contents of the cars. Transferring the ties from one car to another.

Q. When they made that demand about the Pennsylvania cars, that you should unload them and then new cars thus loaded turned over to the Pennsylvania, why did you consent to do that, or why did you do it?

A. What did I do what?

Q. Unload the cars and transfer the contents to other cars for the Pennsylvania?

A. Because the Pennsylvania Railroad Company, I had made a contract with the Pennsylvania Railroad which was our best

customer, and I didn't want to put them to any trouble on account of any controversy I might have with the L. & N. Therefore I assumed the expense of transferring.

Q. Did you or not have any conversation with the Superintendent of Transportation of the L. & N. Railroad Company?

A. I went to Mr. Phelps' office.

Q. About what matter?

155 A. I went to Mr. Phelps' office and told him we were being subjected to a great delay in the shipments in the L. & N. cars were furnished for the transportation of our ties. Acting under authority of the Superintendent of the Pennsylvania, I tendered him Pennsylvania cars to be loaded with Pennsylvania ties. He rejected the offer saying that he had had instructions from superior officials to use only L. & N. cars for business.

Q. You say you tendered him Pennsylvania cars? Explain where were those cars to be turned over to the L. & N. and where were they to go?

A. At Louisville, to go down the line of the L. & N. and loaded with ties.

Q. And brought back to the Pennsylvania?

A. And brought back to the Pennsylvania.

Q. And then, turned over to the Pennsylvania?

A. Yes, sir; that having been the universal practice in the handling of cross-ties up to the time of this controversy.

Q. Had you ever done that before, or had it done for you?

A. What?

Q. What we were speaking of. Had they accepted cars from the Pennsylvania—

A. That was the practice—

156 Defendant objects and moves the court to exclude the witness' statement about the ordinary practice, but the court overrules the objection, to which the defendant excepts.

Q. I asked you whether or not before your conversation with Mr. Phelps, which you have just detailed, whether you had, before that time, procured cars of other roads, like the Pennsylvania, taken empty by the L. & N. down the road and loaded with ties and brought back?

A. Our method of getting cars—

Defendant objects, but the court overrules the objection, to which the defendant excepts.

A. (Cont'd). Yes, sir.

Q. Have you got a letter on that subject from the L. & N. officials?

A. I have a letter from the same office—from Mr. Phelps' in which he—

Defendant objects.

Q. Don't tell the contents of the letter, but show that letter to Mr. Bruce and offer it in evidence.

The witness hands paper to counsel for defendant.

An adjournment was here taken to 2:15 o'clock P. M.

157 Resumed at 2:15 o'clock, as per adjournment, with the witness, C. P. Bush, still on the stand, under examination by Mr. Baskin.

Q. Mr. Bush, have you any correspondence between your company and Mr. D. M. Goodwyn, General Freight Agent of the L. & N. Railroad Company, in regard to the rates?

A. Yes, sir.

Q. Or H. G. Dempf?

A. Yes, sir.

Q. Or J. F. Seger?

A. Yes, sir.

Q. I will ask you to read those to the jury please, in their proper order?

Defendant objects to the introduction of the letters, but the court overrules the objection, to which the defendant excepts.

The witness reads as follows:

"LOUISVILLE, KY., July 26, 1910.

Ohio Valley Tie Co., Louisville, Ky.

GENTLEMEN: During the month of April, 1910, there were quite a number of cars loaded with ties from Lewisburg, Ky., consigned to N. Y. C. & St. L. Ry., routed via Pennsylvania. These 158 ties I understand, were shipped for your account.

In billing cars to connections we assessed the lumber rate of 10¢ per cwt., but according to instructions from the General Freight Office, this rate does not apply on ties in interstate movement that, having no commodity rates, fifth class rate should apply. We issued corrections to the Monon, changing rate from 10¢ to 32¢ per cwt., but same are returned declined, claiming consignees are not in position to pay having made settlement with you. As you received the benefit of this undercharge, will you kindly advise if you will accept corrected bills based on 32¢ per cwt., to Louisville and pay us the difference?

Under rulings of the Interstate Commerce Commission, you understand, we are compelled to charge and collect at the published tariff rate.

Yours truly,

H. G. DEMPF, *Agent*.
A. W. H."

Said letter is filed herewith as Exhibit F.

50 Q. What road does that refer to there? Is that the Nickel Plate?

A. The Nickel Plate business; yes, sir. Here is a letter from the Ohio Valley Tie Company to D. M. Goodwyn:

The witness reads the letter as follows:

"July 29, 1910.

Mr. D. M. Goodwyn, Gen. Frt. Agt., Louisville & Nashville R. R.
Louisville, Ky.

DEAR SIR: Under date of June 14th we wrote you to advise what your future policy would be with reference to Interstate shipments of cross-ties on which you have been assessing the Fifth Class merchandise rate, but up to this time we have not heard from you.

We enclose herewith a copy of a letter which we have received from Mr. H. G. Dempf asking if we will accept corrections on several car-loads of ties shipped from Lewisburg, Ky., to the N. Y. & St. L. Railway on which your Company charged the lumber rate of 10c. per cwt. instead of the Fifth Class merchandise rate of 32c. and this is to advise that we have no objection to accepting this correction provided your Company will join with us in a stipulation to the Interstate Commerce Commission for your authority to refund to us the difference of 22c. cwt. between the Fifth Class merchandise rate and the lumber rate applying from this point; and also if you will in the future apply the lumber rate on all shipments of cross-ties from points on your Line.

Unless you care to do this, we think this an excellent opportunity to test the legality of this excessive rate. We understand that if we refuse to pay this difference of 22c. cwt. that it will be your duty to file suit for collection of the same, and we wish to say that we would welcome such a suit, as it would afford us the opportunity of settling once for all the legality of these charges which, in many instances amount to more than the value of the ties.

Will say, however, in this connection, that we have shipped many cars of ties from your Line on which you have charged the lumber rate, but from Mr. Dempf's letter we understand that in your view this was in violation of the Interstate Commerce Law.

Kindly give this matter careful consideration, and advise us your conclusion as soon as possible, as we cannot reply to Mr. Dempf until we hear from you.

Yours truly,

OHIO VALLEY TIE CO.,

By ———."

Said letter is filed herewith as Exhibit H.

161 A. (cont'd). Here is a letter from the Freight Claim Agent:

The witness here reads letters as follows:

LOUISVILLE, Ky., Nov. 10-10.

The Ohio Valley Tie Co., Columbia Bldg., Louisville, Ky.

GENTLEMEN: On Oct. 11th. last, we issued voucher in favor of your company for \$131.76, as overcharge one carload of cross ties

ing from Bowling Green, Ky., to the N. Y. C. & St. L. Ry., at Pa., based on our protection of the lumber rate, which has not authorized on interstate traffic.

view of this, the payment is illegal, and I shall be glad to have send me your check for \$131.76 by return mail.

Yours truly,

J. F. SEGER,
Freight Claim Agent.

"LOUISVILLE, KY., Nov. 10-10.

Ohio Valley Tie Company, Columbia Building, Louisville, Ky.

GENTLEMEN: I find that under date of Sept. 30th, we issued voucher in your favor for \$936.45, as overcharge on the above mentioned claim, covering thirteen cars of cross ties, moved from various points in Kentucky on our line to the N. Y. C. L. Ry., at Erie, Pa., via Louisville and the Monon, which was in error, as we have not authorized the application of lumber on cross ties, except between points within the State of Kentucky, and, therefore, cannot apply this basis to interstate traffic. I shall be glad to have you send me your check for this amount, return mail, being careful to make reference to the above mentioned claim, in doing so.

Yours truly,

J. F. SEGER,
Freight Claim Agent.

"LOUISVILLE, KY., Nov. 10-10.

Ohio Valley Tie Company, Columbia Building, Louisville, Ky.

GENTLEMEN: On Oct. 3rd, we issued voucher in your favor for \$83, as overcharge on cross ties moving from various points in Kentucky to Louisville, some of which were reconsigned to Shirley, Ind., and others billed to the N. Y. C. & St. L. Ry. Co., at Erie, Pa.

As explained to you in several communications I have given you today in connection with two other claims, this payment is legal, in view of the fact that the application of lumber rates is authorized within the State of Kentucky on intrastate business; consequently we cannot protect the intrastate rate on interstate business.

Please, therefore, send me your check for \$394.83 by return mail.

Yours truly,

J. F. SEGER,
Freight Claim Agent.

"December 9, 1910.

D. M. Goodwyn, Gen. Frt. Agt., L. & N. Railroad, Louisville,

DEAR SIR: Your letter of December 7th file 354149 Fat.

I note that it is your intention to publish, as soon as possible,

a tariff applying the lumber rates on cross-ties from Smith's Grove and Oakland, Ky., on business destined to Shirley, Ind., but owing to tariff complications you cannot now issue tariff.

164 We write to ask if you cannot give us some idea as to the date when this tariff will become effective, as we will be very glad to wait a reasonable length of time in order to accommodate you, but if there is to be an indefinite delay it is better for us to make formal complaint to the Interstate Commerce Commission which seems to be giving such cases preferred attention as shown by the fact that the formal complaint of the Chicago Car Lumber Co. vs. L. & N. R. R., (opinion #1393) was submitted on June 28, 1910, and decided October 10, 1910, or in about three months.

If the claim to which you refer was the only claim of this kind which we have against your Company the matter would be less important, but we have other claims now in Mr. Seger's hands as follows:

\$350.63 #0-111005,
\$138.60 #0-111006,
\$352.40 #0-105325,

covering shipments of ties from various other points on your line.

We also have in our possession expense bills amounting to more than \$4,000 of this overcharge. The cars on which this overcharge accrues were shipped from a good many different stations to several different destinations, and therefore cannot be handled by

165 joint stipulations to the Interstate Commerce Commission, unless it is your intention to so change your tariffs as to apply lumber rates on interstate shipments of cross-ties from all points on your line.

Kindly advise by return mail if it is your intention to so change your tariffs, and if it is not your intention kindly have Mr. Seger return the above numbered claims as we wish to present these and all future claims of this kind to the Interstate Commerce Commission.

Yours truly,

OHIO VALLEY TIE CO."

Said letters are filed herewith as Exhibits I, J, K, and L.

166 Q. Did you get an answer to that letter to Mr. Goodwyn, the one you have just read?

A. No, sir.

Q. You got no answer?

A. No, sir. Here is a letter to Mr. Seger.

The witness here reads letter as follows:

"December 13, 1910.

Mr. J. F. Seger, F. C. A., L. & N. R. R., Louisville, Ky.

DEAR SIR: Answering your letters of November 10th files C-90786, O-91208Ha, O-10273VA. and O-103897va. in which you request that we send you checks for \$131.76, \$936.45 and \$394.83 respectively.

Beg to advise that we cannot see our way clear to refund you this money for the reason that we consider that these overcharges on cross-ties are illegal as decided by the Interstate Commerce Commission's opinion #1393 in Chicago Car Lumber Co., vs. L. & N. R. R. Co.

However, we will join with you in a stipulation to the Commission concerning these three over-charge claims, and, if the Commission holds that we ought to return this money in view of the fact that the published rates authorize these exorbitant charges we will glad- do so, and then file formal complaint for reparation with interest. Or, if your officials will advise us that they will issue new tariffs making the rates on interstate shipments of cross ties from all points on your Line the same as the lumber rates, and will agree to join with us in a stipulation and request for refund with interest, we will pay this money without taking the matter to the Commission as suggested above.

We now have claims against your Company, and expense bills on which we have not filed claim, amounting to nearly \$5000.00 and as we are continuing to ship ties off your Line you can see that the matter is becoming a serious one with us.

Please advise your wishes in this matter.

Yours truly,

OHIO VALLEY TIE CO."

Said letter is filed herewith as Exhibit M.

168 A. (cont'd). We received no reply to this letter.

Q. Did you ever get any answer to that letter?

A. No, sir.

Q. Did he file any suit against you?

A. No, sir; they let the matter drop.

Q. Did Mr. Goodwyn answer either one of those letters that you wrote to him?

A. No, sir.

Q. Have you another letter which you wrote to Mr. Goodwyn asking him to put the ties on the lumber rate?

A. Yes, sir; it didn't refer to these claims, but I wrote him a letter making a general request to that effect.

Q. Get that letter and read it to the jury and also the answer; show them to Mr. Bruce.

The witness hands letters to counsel for defendant.

Q. Did the L. & N. Railroad Company make any further effort to get you to refund any of that money that they had paid back to you?

A. No, sir.

Defendant objects to the last letters referred to, but the court overrules the objection, to which defendant excepts.

The witness reads letter as follows:

169

"LOUISVILLE, KY., October 3, 1911.

Mr. D. M. Goodwyn, Gen. Fr't Agt., Louisville & Nashville R. R. Co., Louisville, Ky.

DEAR SIR: At this time we are the owners of large numbers of cross-ties and switch-ties located at various stations on your lines.

We also own standing timber purchased for the purpose of manufacturing cross-ties and switch-ties, and we expect to continue in the business of buying timber for the manufacture of cross-ties and switch-ties, and purchasing cross-ties and switch-ties from producers on the lines of your Company. We have a market for these cross-ties and switch-ties at various points outside of the State of Kentucky, namely:

Chicago, Ill.; Indianapolis, Ind.; Cincinnati, Ohio; Erie, Pa.; New Albany, Ind.; Toledo, Ohio; Detroit, Mich.; Jeffersonville, Ind.; Cleveland, Ohio; Battle Creek, Mich.; Shirley, Ind.; Chatfield, O.

We write you this letter for the purpose of asking you to put in effect your lumber rates on cross-ties and switch-ties from all 170 points on your lines in Kentucky (except those from which you now publish lumber rates on inter-state shipments) to all of the above named points.

The Interstate Commerce Commission in the case of the Chicago Car Lumber Company versus Louisville & Nashville R. R. Co., said:

'The Commission has repeatedly held that the rate on ties should not exceed the rate on lumber from which they are made, and while the defendant does not always equalize lumber and tie rates it has usually done so when requested by complainant.'

In view of the language of this decision we deem it proper to make the above request before proceeding formally before the Interstate Commerce Commission in this matter.

Kindly favor us with an early reply.

Yours truly,

OHIO VALLEY TIE CO."

Said letter is filed herewith as Exhibit N.

The witness reads letter as follows:

171

"LOUISVILLE, KY., October 12, 1911.

Ohio Valley Tie Co., Louisville, Ky.

GENTLEMEN: Rates on cross ties and switch ties to Louisville, Cincinnati, etc.

Answering your letter of October 3rd, beg to say that we are not prepared to establish the lumber rates on cross ties and switch ties, carloads, from all points on our line in Kentucky to Louisville, Cincinnati, etc.

Yours truly,

D. M. GOODWYN,
General Freight Agent."

Said letter is filed herewith as Exhibit O.

172 Q. Who signed that? Whose letter is that you read?
A. D. M. Goodwyn, General Freight Agent of the L. & N. Railroad Company.

Q. Have you got that decision of the Interstate Commerce Commission in Chicago Lumber case against the L. & N. Railroad Company that you referred to?

A. Yes, sir, I have it here.

Q. Read it to the jury.

Defendant objects, but the court overrules the objection, to which the defendant excepts.

The Witness reads the opinion as follows:

"No. 3136. Chicago Car Lumber Company v. Louisville & Nashville Railroad Company.

Submitted June 28, 1910. Decided October 10, 1910. Reparation awarded upon four carload shipments of railroad ties between Tennessee Ridge, Tenn., and Louisville, Ky.

Report of the Commission.

The complainant entered into a contract with the Cleveland, Cincinnati, Chicago & St. Louis Railway Company to furnish it at Shirley, Ind., a certain number of ties, and by the terms of said
173 contract the complainant was to deliver the ties to the carrier at Louisville, Ky., so that they could be carried from Louisville to Shirley free of charge on account of being company material. Acting under such contract the complainant on December 15 and 16, 1908, shipped four carloads of railroad ties aggregating in weight 190,800 pounds from Tennessee Ridge, Tenn., to Shirley, Ind. upon which there was charged and collected the amount of \$648.72 based upon a rate of 34 cents per 100 pounds, which was constructed of a rate of 33 cents to Louisville plus a 1-cent bridge toll across the Ohio River. The defendant, upon the theory that there was a misrouting, has refunded the amount of \$457.92, being the difference between the total amount paid based on a 33-cent rate and that which would have been paid based on a 9-cent rate, the 9-cent rate being in force between Tennessee Ridge and Evansville, Ind., on the direct line to Shirley by another route. This petition is brought for the purpose of obtaining reparation in the amount of 1 cent per 100 pounds applied to the weight of the shipment of \$19.08. The complainant insists that the lumber rate between Tennessee Ridge and Louisville, which was 8 cents per 100 pounds, should have applied to the transportation of ties. The Commission has repeatedly held that the rate
174 on ties should not exceed the rate on lumber from which they are made; and while the defendant does not always equalize lumber and tie rates, it has usually done so when requested by complainant. In this case the consignor requested the defendant to put in an 8-cent rate from Tennessee Ridge to Louisville, which was contemporaneously in effect on lumber between these points, but before the request could be complied with the shipments moved and the 33-cent rate had to be applied, though the 8-cent rate was subsequently established and is now in effect.

Although the difficulty would have been avoided had the consignor awaited the publication of the 8-cent rate before shipping, we are of the opinion that the rate upon ties should not have exceeded the lumber rate, and we find that all charges in excess of 8 cents per 100 pounds were unreasonable.

An order will be entered awarding reparation to complainant in the sum of \$19.08, with interest from January 1, 1909, and directing defendant to maintain for a period of two years a rate for the transportation of ties, in carloads, from Tennessee Ridge, Tenn., to Louisville, Ky., which shall not exceed the rate contemporaneously in effect for carriage between the same points of lumber similar in quality to that from which the ties are made."

Said opinion is filed herewith as Exhibit P.

175 Q. Have you another decision in which the L. & N. Railroad Company was a party?

A. I have one here in which the L. & N. was not a party and another one in which they were. This was the original decision of the Interstate Commerce Commission in all tie cases.

Q. When was that rendered?

A. It was rendered January 13, 1888.

Plaintiff offers the opinion in evidence, and asks that the witness be permitted to read — to the jury, to which defendant objects and the court sustains the objection. Plaintiff reserves an exception to the ruling of the court and makes the following

Avowal: Plaintiff avows that if permitted to do so, the witness would read the opinion in the case as follows:

"Before the Interstate Commerce Commission.

Thomas J. Reynolds vs. Western New York and Pennsylvania Railway Co. and G. Clinton Gardner, Receiver of the Buffalo, New York and Philadelphia Railroad Co.

Tried December 7, 1887. Decided January 13, 1888.

Report and Opinion of the Commission.

WALKER, Commissioner:

Complaint of alleged unreasonable and unjust charges for the transportation of railroad ties. The answer asserts that the charges complained of are reasonable and just.

The following facts are found from the proofs:

The railroad in question extends from Rochester, N. Y., southwesterly through Olean and Salamanca into the State of Pennsylvania. It connects at Rochester with the New York Central and the West Shore railroads, at Olean with the Delaware, Lackawanna and Western, and at Salamanca with the New York, Lake Erie and Western. It was formerly owned and operated by the Buffalo, New York and Philadelphia Railroad Company. In actions brought in the United States courts of New York and Pennsylvania to foreclose a mortgage upon the property of that company G. Clinton Gardner was appointed receiver May 20, 1885, and has since operated the property of said company as such receiver. A new company has

recently been organized under the foreclosure, entitled the Western New York and Pennsylvania Railway Company. It is expected that said receiver will surrender possession to the latter company about

January 1, 1888. The last-named company and said receiver
177 are the parties defendant in this proceeding.

Complainant is a manufacturer of lumber in the State of Pennsylvania, having an office at Rochester, N. Y. He owns several thousand acres of timber land near the line of said railroad in the vicinity of Corydon, Pa.

Corydon is distant 20 miles from Salamanca, 39 miles from Olean, and 147 miles from Rochester.

For several years complainant has been engaged in manufacturing lumber in Northern Pennsylvania upon the line of said railroad and of the Buffalo, Rochester and Pittsburgh Railroad, most of which has found a market in the State of New York. Much of his timber is oak, of which the trunks are sawn into squared lumber and boards, and the smaller trees, pieces, and large branches manufactured into railroad ties, both sawn and hewn. He also manufactures ties to some extent from chestnut and hemlock. The purchasers of his ties have been the railroad companies above named and other roads reached over said intersecting lines through Salamanca, Olean, and Rochester.

Prior to June 15, 1887, the classification in use upon this road, as well as upon other roads in the vicinity, nominally placed lumber in the sixth class, in which railroad ties were included, though
178 not specially named. Lumber, however, being an article of merchandise of considerable bulk in proportion to its value and in respect to which keen competition is met among producers, has for a long time been specially treated, forming practically a class by itself, and receiving very low and special rates; and this practice continues to the present time.

Upon this road lumber and ties were formerly shipped for complainant at identical rates. About February, 1886, the price charged for transportation of ties was greatly increased, so that complainant ceased their shipment for a time. Upon the taking effect of the Act to regulate commerce the charges upon ties and the method of collecting the same were so adjusted that his manufacture and shipment thereof were resumed. On July 15, 1887, what is known as the "official classification No. 2" became operative, and was adopted by the defendant in common with the other roads north of the Ohio and east of the Mississippi. In this classification lumber in car-load lots is in class six; in less than car-load lots, class four. Railroad ties in car-load lots are in class five; in less than car-load lots, class four. It is the only form of rough lumber which was raised to class
179 five in car-loads.

Defendant has continuously maintained its low special rate upon lumber without regard to its being classified in the sixth class, but insists upon the regular fifth-class tariff rate for railroad ties. There have existed some other apparent irregularities which have presented themselves to complainant's mind as matters of grievance, arising in part from the fact that special rates were

purpose not readily apparent and different from the reasons which ordinarily influence classification. No valid excuse for the discrimination being shown, the Commission are of the opinion that the classification of railroad ties in car-loads should be reduced to that of lumber.

The question whether or not railroad ties should receive the special lumber rate involves other considerations. Defendant's position respecting the low rate placed upon lumber is that the lumber rates are too low to afford a reasonable compensation to the carrier, and that they are made to meet the competition of lumber brought from other directions over their roads, and are necessary in order to enable defendant to do any lumber business at all, the rates to Rochester in particular having been reduced on September 1, 1887, from \$1.25 to \$1.10 per ton for that very reason; and it is claimed that no such fact exists in regard to ties, which do not meet the same competition, and can properly be charged a higher rate of transportation.

The special lumber rate from Corydon to Salamanca, 20 miles, is \$12 per car of twenty tons, which is said to be about the usual 185 car-load weight, or 3 cents per ton per mile; to Olean, 39 miles, \$12 per car, or 1-1/2 cents per ton per mile, and to Rochester, 147 miles, \$22 per car, or 7-1/2 mills per ton per mile.

No proof has been made of any competition which meets Pennsylvania lumber at either Salamanca or Olean, nor is it apparent that the rates to those points are inordinately low. At Salamanca the rate of 60 cents per ton cannot with justice be claimed to be exceptionally low upon a product of the character of lumber. To charge double that rate upon ties, or \$24 per twenty-ton car plus \$1.13 switching charge, making \$25.13 for a haul of 20 miles, is not relatively reasonable and just, especially in view of the fact that the value of the lumber at Salamanca would be about \$176 and of the ties about \$110.

The car-load rate to Olean on lumber remains at \$12 and on the ties is increased to \$40.

The present lumber rates to Salamanca and Olean are of long standing, having been originally given to complainant as a special rate, and announced as the public rate upon the passage of the Act to regulate commerce.

As complainant in his testimony distinctly states that Rochester is not now a tie market, no order will be made at present in respect to that point.

186 The circumstance cannot escape observation that the only possible purchasers of railroad ties are railroad companies. It is also obvious that the value of ties at Corydon is their selling price at Salamanca and Olean less the freight. Therefore, the higher the freight, the less the value of the ties at Corydon. The defendant itself is a purchaser of ties; it bought a lot of complainant in 1886. The ordinary conflict of interest between the railway and the shipper is here intensified by the fact that the direct interest of the carrier requires the cheapening of the shipper's product. It was candidly admitted by its general superintendent that this consideration influenced the conduct of defendant in fixing its rates upon ties at a

when its interstate rates were not subject to control under a law Congress. But if this was legal then, it is so no longer. It involved and implies extortion. It is not only repugnant to every man's sense of propriety and justice, but it is directly forbidden and made illegal by the third section of the Act to regulate commerce, that it subjects this particular description of traffic to undue and reasonable prejudice and disadvantage for the pecuniary benefit of the carrier itself. It is a course of dealing if possible even

more obnoxious to the just provisions of the act than would be a tariff arranged in the same manner for the purpose of giving a preference to another shipper competing from another direction in the same market.

Rates established by a common carrier under the influence of a desire to keep upon its line a material for which the road itself has no use, or to keep the price thereof low for its own advantage, cannot be justified either in morals or in law. Every party who produces such a material is entitled to sell it when he wishes, in the best available market, and the common carrier has no right to prevent his doing so by disproportionate or unreasonable rates. This the defendants in the present case have been attempting to do:

The order of the Commission will be that the defendant cease and desist from charging a greater price for the transportation of railroad ties from points in Pennsylvania to Salamanca and to Milan, in the State of New York, than is charged for the transportation of lumber at the same time between the same points.

A true copy.

[SEAL.]

GEORGE B. MCGINTY, *Secretary.*"

Said opinion is filed herewith as Exhibit AA.

88 Q. Have you another one there?

A. We have here a report of the Interstate Commerce Commission in our case against the L. & N. Railroad Company for the recovery of the money which was charged us over and above the lumber rate on shipments of ties to the Nickel Plate Railroad, mentioned some time ago.

Q. Just read that to the jury.

Defendant objects, but the court overrules the objection, to which the defendant excepts.

The witness reads the opinion as follows:

"The complaints in these cases involve the rates upon crossties shipped from points in Kentucky and Tennessee to points north of the Ohio River and allege that the rates charged were unreasonable to the extent that they exceeded the rates contemporaneously applicable to the transportation of lumber of the kind of wood from which said ties are made.

The complaint in No. 3913, the original complaint in No. 4411, and sub-No. 2 to No. 4411 were filed March 7, September 15, and October 3, 1911, respectively. They allege that the complainant is a corporation engaged in manufacturing and selling crossties, with

principal place of business at Louisville, Ky.; that at various
189 times between May 10, 1909, and August 7, 1911, it shipped
70 carloads of crossties from the several stations mentioned
in the complaints upon the line of the defendant Louisville, Henderson & St. Louis Railway Company, via Louisville, to Cleveland and Chatfield, Ohio, Erie, Pa., and Rushville and Shirley, Ind., for the transportation of which the defendants charged rates that were unreasonable to the extent that they exceeded the rates contemporaneously in effect on lumber. Reparation is sought. There were no joint rates from points of origin to destination, the through rates being constructed on the combination of rates upon the Ohio River. No complaint is made of the rate north of the Ohio River; but for the transportation up to the river, performed by the Louisville, Henderson & St. Louis Railway Company, the rate upon ties was in excess of the rate contemporaneously applicable to lumber.

The Louisville, Henderson & St. Louis Railway Company denies that the charges were unreasonable and contends that the rates on lumber to Louisville from the points of origin mentioned in the complaint are abnormally low, owing to water competition for the carriage of lumber, due to the fact that logs from this territory are floated down the various streams to the Ohio River and across
190 to the mills and factories on the north side. Formerly the rate on ties was the same as the rate on lumber, but within the last three years the rate on ties has been materially advanced. No evidence was submitted showing reductions of rates on lumber, nor was it shown that such rates are not remunerative.

In *Reynolds v. W. N. Y. & P. Ry. Co.*, 1 I. C. C., 393, the question of the rate upon crossties and lumber was carefully considered, and it was held that the rate upon crossties ought not to exceed the rate on lumber of the kind of wood from which the ties are made. Many cases involving the same question have since been before the Commission, and the principles announced in the case above mentioned have been closely adhered to. In *Beekman Lumber Co. v. C. R. I. & P. Ry. Co.*, 16 I. C. C., 528, the Commission said:

It is not necessary for us to go again into the question of the rates on ties. The position of this Commission is definite and plain that the rates on ties should not exceed the rates upon lumber of the class and description of which the ties are made.

Upon the facts of record we find that the water competition
191 alleged by defendant does not justify the higher rates on ties, and we are of opinion that the rates charged upon these ties were unreasonable so far as they exceeded the rates contemporaneously applicable to lumber of the same kind of wood. The following table shows the details respecting the shipments covered by the complaints in dockets Nos. 3913, 4411, and Sub-No. 2 to No. 4411, all of the shipments having moved from the points of origin named in the table over the Louisville, Henderson & St. Louis Railway to Louisville and thence to final destinations north of the Ohio River.

OHIO VALLEY TIE COMPANY

97

To Louisville; rate per 100 pounds.

Origin.	Carloads.	Weight. Pounds.	Ties. Cts.	Lumber. Cts.	Reparation.
Docket No. 3913.					
Medora, Ky.	3	134,300	5	4	\$13.43
Cloverport, Ky.	5	230,000	9	6	69.00
Sample, Ky.	3	123,000	8	6	24.68
Stites, Ky.	1	35,200	6	4	7.04
Do.	4	179,300	5	4	17.93
Guston, Ky.	5	232,400	8	6	46.48
Do.	12	725,600	10	6	290.24
Do.	1	54,300	11	6	27.15
Harned, Ky.	9	471,900	11	8	141.54
Hardinsburg, Ky.	5	232,500	11	8	69.75
McQuady, Ky.	1	57,500	11	8	17.25
Irvington, Ky.	2	115,000	11	6	57.50
Basin Spring, Ky.	5	308,450	11	8	92.53
	56	2,899,850			874.52

92
Docket No. 4411.

Sample, Ky.	5	242,840	13	6	169.99
Stites, Ky.	1	44,700	5	4	4.47
	6	287,540			174.46

Docket No. 4411, sub-
No. 2.

Cloverport, Ky.	5	290,100	14	6	232.08
Irvington, Ky.	3	163,000	11	6	81.50
Garfield, Ky.	2	126,600	14	8	75.93
Guston, Ky.	1	47,000	10	6	18.80
Webster, Ky.	1	58,800	11	6	29.40
Stites, Ky.	1	48,000	5	4	4.80
Basin Spring, Ky.	4	233,500	14	8	140.10
	17	967,000			852.64

We find that complainant made shipments and paid charges thereon as set forth in the foregoing table and that the rates applied to said shipments were unreasonable to the extent that they exceeded, respectively, the rates set forth in the column headed "lumber;" that complainant has been damaged to the extent of the difference between the amounts which it did pay and the amounts which it would have paid at the rates above found unreasonable; and that it is therefore entitled to an award of reparation in the sum of \$1,631.62, with interest thereon from August 7, 1911. An order will be entered awarding reparation in the amount stated and requiring defendant to establish for the future rates for the transportation of ties to Louisville, when destined to interstate points beyond, not in excess of the rates contemporaneous with the rates found unreasonable.

7-824

neously maintained by them for similar transportation of lumber of the kind and description from which said ties are made.

In Sub-No. 1 to No. 4411, the complainant, by petition filed September 15, 1911, alleges that between May 27, 1910, and April 10, 1911, it shipped 91 carloads of crossties from Coal Creek, Tenn., and various points in Kentucky, on the line of the defendant Louisville & Nashville Railroad Company, to Cincinnati, Ohio, Indianapolis, Rushville, and Shirley, Ind., and Erie, Pa., for the transportation of which the defendants assessed rates which were unreasonable to the extent that said rates exceeded the rates contemporaneously maintained for similar transportation of lumber.

With the exception of the shipment of one carload from Coal Creek to Cincinnati, all other shipments involved moved via Louisville, and this claim is based upon the fact that the separately established rates charged by the Louisville & Nashville Railroad Company from the several points of origin to Cincinnati and Louisville exceeded the rates contemporaneously maintained by that carrier

for the transportation of lumber from said points of origin to Cincinnati and Louisville. No complaint is made of the rates charged north of the Ohio River. This defendant answered and admitted that the shipments moved as alleged in the complaint; admitted the allegations respecting the rates charged and the rates contemporaneously in effect on lumber, but denied that such charges were unreasonable.

For reasons set forth above, we find that the rates charged on these shipments of ties were unreasonable to the extent that they exceeded the rates contemporaneously in force from and to the same points and applicable to lumber of the class and description of wood from which said ties were made.

The attitude of the principal defendant in this and other recent cases involving rates on crossties has the appearance of a wilful disregard of the rulings of the Commission. The policy of this carrier hampers the industry and discourages the producers of ties and subjects them to the delay and expense incident to proceedings before the Commission.

The following table shows the details respecting the shipments covered by the complaint in Sub.-No. 1 to No. 4411, all of the shipments having moved from the points of origin named in the table over the Louisville & Nashville Railroad to Louisville and thence to final destinations north of the Ohio River, except the shipments from Coal Creek, which moved to Cincinnati.

Origin.	Carloads.	To Louisville and Cincinnati; per 100 pounds.			
		Weight. Pounds.	Ties. Cts.	Lumber. Cts.	Reparation.
Creek, Tenn.	1	42,000	46	13	\$138.60
Haven, Ky.	2	117,100	22	7	175.65
mor, Ky.	1	45,100	32	10	99.22
burg, Ky.	8	454,000	32	10	998.80
River, Ky.	8	384,300	12	5	269.01
stown Junction, Ky. ..	10	550,200	14	5	495.18
herdsville, Ky.	6	340,200	12	5	238.14
ks, Ky.	8	324,600	10	4	194.76
field, Ky.	2	125,200	32	9	287.96
Hope, Ky.	1	56,200	22	7	84.30
on, Ky.	1	197,700	32	10	123.42
sville, Ky.	4	197,700	16	5	217.65
and, Ky.	7	376,150	32	8	902.76
cy Hill, Ky.	1	50,200	32	8	120.48
mont, Ky.	13	687,900	14	5	619.11
s, Ky.	3	158,160	16	5	173.98
ertonville, Ky.	1	63,000	22	6	100.80
rs, Ky.	2	117,800	22	6	188.48
on, Ky.	1	52,600	18	6	63.12
h Park, Ky.	4	242,100	7	3	96.84
ers, Ky.	2	77,500	10	4	46.50
on, Ky.	1	70,900	25	7	127.62
nieville, Ky.	1	59,000	27	8	112.10
th's Grove, Ky.	3	134,800	32	8	323.52
	91	4,782,810			6,198.00

We further find that complainant made the shipments as set forth in the foregoing table and paid charges thereon at rates herein found to have been unreasonable; that complainant has been damaged to the extent of the difference between the amount which it did pay and the amount which it would have paid the rates above set forth as lumber rates; and that it is, therefore, entitled to an award of reparation in the sum of \$6,198, with interest thereon from the 21st day of April, 1911.

An order will be entered awarding reparation in this amount and requiring defendant to establish for the future rates from Coal Creek, Tenn., to Cincinnati, Ohio, and from the other points above named, except Lewisburg, to Louisville, Ky., when destined beyond Louisville to points north of the Ohio River, which shall not exceed the rates contemporaneously applied by it to similar transportation of lumber of the kind and description of wood from which ties are made. In the case of Timmons Harmount v. L. & N. R. Co., Unreported Opinion No. 545, the Commission made an order with respect to the rate on crossties from Lewisburg, Ky. to Louisville, Ky., when destined beyond to points north of the Ohio

River. Therefore, no order for the future will be entered
Lewisburg.

197 The petition in Sub. No. 3 to No. 4411 was filed Oct.
2, 1911. The complainant, Bond Brothers, is a corporation
with principal place of business at Elizabethtown, Ky., and is
engaged in manufacturing and selling crossties. Its petition
states that during the month of March, 1911, it shipped from various
points on the line of the defendant Louisville & Nashville Railroad
Company to Madeira, Ohio, 20 cars of white oak ties, for the trans-
portation of which defendants collected charges that were unrea-
sonable to the extent that such charges exceeded the charges which
would have accrued at the rates contemporaneously applicable to the
transportation of lumber. Reparation is asked.

No complaint is made of the rates charged north of the
River, the complaint being confined to the separately estab-
lished rates of the Louisville & Nashville Railroad Company for the
transportation of the through transportation performed by it between the
points of origin in Kentucky and Louisville. In view of what has
been said in connection with the other cases above decided, no further
comment upon the rates is necessary. We find that said rates
were unreasonable to the extent that they exceeded the rates con-

temporaneously applicable to similar transportation of lumber
198 kind of wood from which said ties were made. The fol-
lowing table shows the details respecting the shipments com-
plained of by the complaint in Sub-No. 3 to No. 4411, all of the shipments
being moved from the points of origin named in the table over
the Louisville & Nashville Railroad to Louisville and thence to final
destination north of the Ohio River.

Origin.	Carloads.	To Louisville; rates per 100 pounds.			Repa-
		Weight. Pounds.	Ties. Cts.	Lumber Cts.	
Munfordsville, Ky.	4	227,500	29	8	\$47.
Bonnieville, Ky.	2	130,840	27	8	27.
Elizabethtown, Ky.	5	287,600	17	6	33.
Tunnell Hill, Ky.	1	39,503	17	6	4.
Campbellsville, Ky.	1	54,900	33	9	13.
Gravel Switch, Ky.	4	179,800	30	8	33.
Calvary, Ky.	3	153,400	33	9	33.
	20	1,073,546			1,981.35

We find that the charges paid by complainant were unrea-
sonable to the extent that they exceeded, respectively, charges which
would have accrued at the rates set forth in the column headed "Lum-
ber" that complainant has been damaged to the extent of the differ-
ence between the amount which it did pay and the amount
199 it would have paid at the rates above found reasonable.
That it is, therefore, entitled to an award of reparation in
the sum of \$1,981.35, with interest from March 30, 1911. An order
will be entered awarding reparation in this amount and requiring

ant to establish and maintain for the future rates for the transportation of ties from the points named in the foregoing table to Louisville, Ky., when destined to points beyond Louisville north of Ohio River, which shall not exceed the rates contemporaneously obtained by defendant for similar transportation of lumber of the kind of wood from which said ties are made.

Said opinion is filed herewith as Exhibit Q.

Q. Where was the hearing of that case against the L. & N. Railroad Company?

A. It was held in the Custom House at Louisville.

Q. Did the L. & N. Railroad Company appear by attorney and defend the case?

A. No attorney was present when the case was called, and our attorney called up their general office and they sent an attorney who appeared during the hearing.

Q. Did he make any defense or attempt to make any defense for the L. & N. Railroad Company?

Defendant objects, and the court sustains the objection, to which plaintiff excepts.

Q. Did he make any argument?

A. No, sir.

Q. Now, did he introduce any evidence?

A. None.

Defendant objects, but the court overrules the objection, to which defendant excepts.

Q. That case also speaks of the Louisville, Henderson & St. Louis, that what is known as the Henderson Route here?

A. Yes, sir.

Q. Is that part of the L. & N. Railroad Company's system?

Defendant objects, and the court sustains the objection as to the relationship existing between the L. & N. Railroad Company and the Henderson Route.

Mr. BASKIN: The witness has shown that the Henderson Route belongs to the L. & N.

Mr. BRUCE: That is what I am objecting to.

The COURT: I will sustain an objection to that, and direct the jury not to consider Mr. Bush's answer about the L. & N. Railroad Company owning the Louisville, Henderson and St. Louis Railroad.

Q. Mr. Bush, did the L. & N. Railroad Company issue any circular on September 29, 1911, in regard to cross-ties?

A. Yes, sir; there was a circular issued by D. M. Goodwyn, General Freight Agent, on September 29, 1911, and sent to the agents of the L. & N. Railroad Company.

Q. Read that to the jury.

The witness reads as follows:

"Louisville & Nashville Railroad Company.
Office of the General Freight Agent.

N. S. Circular 3045.

Important Notice.

File 354149.

To all Agents of the L. & N. R. R. in State of Kentucky:

202

LOUISVILLE, September 29, 1911.

Shipments of Cross-Ties To Louisville, Ky.

Must not be accepted.

Consigned to the Ohio Valley Tie Co., care Pennsylvania Co., or for "Pennsylvania Deliveries."

Consigned to the Ohio Valley Tie Co., care C. C. C. & St. L. Ry. or Big Four Road, or calling for "C. C. C. & St. L. Deliveries," or "Big Four Deliveries."

Consigned to the Ohio Valley Tie Co., care Monon, or the C. I. & L. Ry., or calling for "Monon Deliveries" or "C. I. & L. Deliveries."

Consigned to the Ohio Valley Tie Co., care B. & O. S. W. R. R., or calling for "B. & O. S. W. R. R. Deliveries."

Can be accepted.

Consigned to the Ohio Valley Tie Co.

Consigned to the Pennsylvania Co.

P. C. C. & St. L. Ry.

C. C. C. & St. L. Ry. or Big Four.

Monon or C. I. & L. Ry.

B. & O. S. W. R. R.

203 Q. Read the balance of it—read all of it.

The witness reads sheet No. 2 of the circular as follows:

"It is very important that these instructions be followed to the letter. Acknowledge receipt by return mail, and advise if understood.

D. M. GOODWYN,
General Freight Agent."

Said circular is filed herewith as Exhibit R.

204 Q. How is that signed?

A. D. M. Goodwyn, General Freight Agent.

Q. Is that a copy or the original circular?

A. This is one of the circulars which they sent out to the agents.

When you got that circular,—that copy of it,—how did you get it?

A. I got it from an L. & N. Railroad agent who said he couldn't do these things for me and gave me this circular.

Q. BRUCE: How is that?

A. THE WITNESS: I got it from an L. & N. Railroad agent.

Q. When you got that circular from the L. & N. Railroad agent, did you go to see any officials?

A. Yes, sir.

Q. Which one, and what occurred?

A. I went to Mr. Dempf's office.

Q. Who is Mr. Dempf?

A. He is the local freight agent.

Q. At Ninth and Broadway?

A. At Ninth and Broadway. And I asked him what consignments to the Ohio Valley Tie Company at Louisville meant, and what could be done with the cars after they reached Louisville, whether they would be on our order switched over to other roads or assigned to sidings in Louisville where we asked them to be consigned, and he said that meant a shipment to the team track of the L. & N. Railroad and nothing more.

Q. Did you have any customers in Louisville other than the three railroads mentioned to whom you were in the habit of doing business?

A. A large number of customers.

Q. What effect did that circular have on your selling?

A. I couldn't ship to these customers over the lines of the L. & N. Railroad.

Q. Why?

A. Because this circular prohibited it.

Q. Name those customers you had—some of them?

A. We had sold to the Louisville Railroad Company, the K. & I. Bridge Company, the Louisville & Jeffersonville Bridge, and to the Hydraulic Brick Company and to the Louisville Public Elevator. That is all I think of now.

Q. Did you sell to the other bridges? You mentioned two bridges and there are three here?

A. The other bridge, the Pennsylvania buys for that.

Q. How did that circular affect your shipping ties to the Nickel Plate Railroad?

A. It stopped us shipping ties to the Nickel Plate Railroad unless we paid the high rate. We formerly billed ties to ourselves at Louisville and paid the freight on the lumber rate to the L. & N., and re-leased the cars on the lumber rate to Erie, Pennsylvania, but this circular prohibited that.

Q. Did you pay these high rates?

A. All cars shipped after that date to the Nickel Plate, we paid higher rates.

Q. And are making claims for the difference?

A. Yes, sir.

Q. How did your shipments to the Nickel Plate for the year ending September 1, 1911, compare with your shipments to that road for the year ending September 1, 1912?

A. During the years 1910 and 1911, we shipped to the Nickel Plate 105,000 ties and during the year ending September 1, 1912, we shipped 45,000 ties.

Q. Why did you ship those 45,000 ties to the Nickel Plate over the L. & N.

A. We had a contract with the Nickel Plate Road for a certain number of ties which we were obliged to fill.

Q. What was the advantage in your selling ties to the Nickel Plate Railroad as compared to the other lines which have terminals in Louisville?

A. It was really one of the most important customers we had, for the reason that the Nickel Plate Railroad goes through a section of country where there are a large number of industries and manufacturing concerns, and those concerns with their various switches and sidings use a low grade of tie, and that made a market for ties such as the lines of the Pennsylvania and Big Four Lines wouldn't use for their regular track—for their main lines—and enabled us to get rid of all kinds of ties that we made, and all qualities of ties which we made or bought.

207 Q. Is there any difference between the Nickel Plate practice and the other roads in sending inspectors or where would they inspect the ties?

A. The Nickel Plate Road have no inspection service such as the Big Four and Pennsylvania, by which the inspectors go to the point where the ties are loaded and inspect them as they are loaded in the cars. Their inspectors stay on their line and inspect the cars where they are unloaded. It was important business for us, because very often we could buy a car of ties where it was necessary to load it at once for some reason, and ship to the Nickel Plate, whereas in the other case either one of the other two of our customers, it would have been necessary to hold the car of ties until the inspector could be sent to load it.

Q. Have you or not lost the business of the Nickel Plate?

A. We have.

Defendant objects, but the court overrules the objection, to which the defendant excepts.

Q. What was the usual profit you made out of the Nickel Plate business?

Defendant objects, but the court overrules the objection, to which the defendant excepts.

Q. (cont'd). Each year, I mean?

208 A. Our business with the Nickel Plate was worth from \$5,000 to \$8,000 a year to us.

Q. How long had that continues? How many years?

A. We have been selling ties to the Nickel Plate Railroad all the time I have been in the tie business. It was our first customer.

Q. Why did you lose the business of the Nickel Plate?

A. Because we couldn't afford to pay the fifth class rate on ties and wait for our money to be refunded to us by the Interstate Commerce Commission. It ties the capital up so rapidly that we had to let the business go.

Section 1. **Carrier or party in possession of any of the property herein described shall be liable for any loss, theft or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for differences in the weights of grain, seed, or other commodities or by natural shrinkage or discrepancies in elevator weights. For loss, damage, or delay caused by the occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination, the carrier or party in possession of the property shall be liable, except in cases of negligence or default of the warehouseman only. Except in cases of negligence or the carrier or party in possession, the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request, or resulting from a defect of vice in the property or from riots or strikes; or for conveyance damage on cotton. When in accordance with general custom, on account of the nature of the property, the carrier or party in possession, in cases of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence.**

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In cases quarantining goods may be required at a time and expense of owners into quarantining deposit or elsewhere, as required by quarantine regulations, or authorities, or for the carrier's deposit, or as nearest available point in the carrier's judgment, and in any such case the carrier's responsibility shall cease when goods are deposited at such place, and the responsibility shall pass to the consignee and to shipping point, arriving French both ways. Quarantine expenses of whatever nature or kind upon or in respect to goods shall be borne by the owners of the goods or by a lien thereon. The carriers shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required by the health authorities, or by the quarantine authorities, or by the sanitary authorities, or by the carrier's officers, crew, agents or employees, nor for detention, loss or damage of any kind occasioned by quarantine or the enforcement thereof.

Sec. 2. In leaving this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law.

Sec. 3. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise that with reasonable dispatch, unless by specific agreement. If ordered thereon, every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination, but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price if any, to the consignee, including the freight charges, if prepaid) as the carrier is required to insure the property, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariff upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such compensation, whether or not such loss or damage occurs from negligence.

Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, within four months after the responsible time for delivery has elapsed. Unless claims are so made the carrier shall not be liable.

Any carrier or party liable on account of loss or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance.

Sec. 4. All property shall be subject to necessary coepporage and belling at owner's cost. Each carrier over whose route cotton is to be transported here-

under shall be the parties, at his or her cost and risk, of compressing the same into a form suitable for transport, and shall not be held responsible for greater consequences in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain or other material in bulk consigned to a point where there is a railroad, public or licensed elevator, or other facility may (unless otherwise expressly noted herein, and then if it is not prominently displayed on the bill of lading) be delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 5. Cargo not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery at the carrier's option, or warehouse, subject to reasonable charges for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, and without liability to the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The car may make a reasonable charge for the detention of any person or car, or for the use of facilities after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading, and may add such charges to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as preventing the time allowed by law or as setting aside any local rule affecting car service or storage.

Property delivered to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after removal from cars or vessels or until loaded into cars or vessels, and when unloaded from cars or vessels or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains, or until loaded into and are unloaded from vessels.

Sec. 6. No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classification or tariff, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 7. Every party, whether principal or agent, shipping explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 8. The owner or consignee shall pay the freight, and average if any, and all other lawful charges according to said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

[illegible]

The term "water carriage" in this section shall not be construed as including lightering across rivers or in lake or other harbors when performed by the rail carrier, and the liability for such lightering shall be governed by the other sections of this instrument.

Sec. 10. Any alteration, addition or erasure in this bill of lading, which shall be made without an indorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

Q. When you made claims before the Interstate Commerce Commission did you have to have lawyers to make the claims for you?

A. Yes, sir.

Q. And pay them fees for getting your money?

A. Yes, sir.

Q. Can you state of your own knowledge now whether the L. & N. Railroad Company has allowed other shippers to the Nickel Plate Road to bill cars to themselves at Louisville and reassign the car to the Nickel Plate Railroad on payment of the lumber rates to Louisville?

A. Yes, sir. They allowed Fowler Brothers, of Colesburg, Kentucky, to ship a car of ties to themselves at Louisville, and the L. & N. took up the bill of lading and charged only the lumber rate from Colesburg to Louisville and reconsigned the car to the Nickel Plate Railroad at Thomaston, Indiana, charging only the lumber rate up to Louisville.

209 Q. Was that after this circular was written?

A. Yes, sir.

Q. Mr. Goodwyn's circular?

A. Yes, sir.

Q. What sort of car was it in?

A. An L. & N. car.

Mr. BRUCE: Have you personal knowledge of this?

The WITNESS: Yes, sir; I have personal knowledge of this transaction.

Q. When these ties reached Louisville, did the L. & N. Railroad Company require or not those ties to be transferred to another car?

A. No, sir; they allowed them to go forward in the L. & N. car.

Q. Across the river?

A. Assessing only the lumber rate on the car.

Q. Have you got bills or papers showing that fact?

A. Yes, sir.

Q. Produce them, please.

A. This car is numbered L. & N. 96,712, shipped by Fowler Brothers from Colesburg, Kentucky, to H. G. Fowler Brothers, Louisville, Ky., on December 11, 1912. The expense bill showing delivery of this car at Thomaston, Indiana, to the New York, 210 Chicago and St. Louis Railway Company, shows that the L. & N. charged for the transportation of ties in this car six cents per hundred pounds from Colesburg to Louisville, six cents per hundred pounds up to Louisville, the rate is not the fifth class rate.

Defendant objects and the court sustains the objection, and directs the jury not to consider the statement of the witness as testimony, as to what rate the car was shipped at, so far as the L. & N. Railroad Company is concerned. The plaintiff excepts to the ruling of the court.

Said papers are filed herewith as Exhibits S—No. I and S—No. 2.

(Here follows Exhibit S No. 1, marked page 211.)

212 The New York, Chicago & St. Louis Railroad Company.

Consignee and Designation, A. W. Johnston.
Pro. No. 48.

Delivery Receipt.

THOMASTON, IND., 12/18/1912.

Route —.

Received in good order from the New York, Chicago & St. Louis R. R. Co. the following described property:

Waybilled from So. Watah.

Date of W. B., 12/18.

Series and No. of W. B. C. N. W. (or C. U. 20).

Initial and No. of car: L. & N. 96712.

Consignor, — — —.

Connecting Line Reference, C. I. & L.

Original Point of Shipment, Colesburg, Ky.

Original W. B. No. and Date —.

Articles and remarks.	Weight.	Rate.	Freight.	Advances.	Total.
Ties.....	56,800	5.3	30.10	
C. S. & L.....		5.7	32.38	
L. & N.....		6.	34.08	
				66.46	
					96.58

Copy.

Exhibit "S. No. 2."

G. H. BOONE,
Official Stenographer.

213 Q. Mr. Bush, I will ask you where a railroad uses empty cars of other roads, whether they have to pay for the use of that car?

A. Yes, sir.

Q. If they load the cars of other roads with freight, they still pay?

A. Yes, sir.

Q. Is there any difference in the rate?

A. No, sir; the charge is a per diem charge.

Q. So much per day?

A. It is paid while the car is on the line of the other road.

Q. Can you state the custom of the Louisville & Nashville Railroad Company and all other roads in Louisville, or, say, the L. & N. Railroad Company alone, about switching cars which it brings into Louisville onto the switches of other roads, connecting, and enterprises and factories connecting?

Defendant objects, but the court overrules the objection, to which the defendant excepts.

Q. What is the custom of the L. & N. about switching cars which they bring into Louisville, containing freight, of course, onto switches of other roads and other enterprises where they have connections?

Mr. BRUCE: I don't know what you mean by switches of other roads.

114 Mr. BASKIN: A switch is a siding.

Q. What has been the L. & N.'s custom?

A. The custom of the L. & N. has been to deliver to the private sidings of any industry in Louisville if the freight originates on the L. & N. Railroad.

Q. How about if the freight is consigned to a connecting carrier at Louisville?

A. The custom is to deliver freight to the connecting carrier.

Q. On their sidings?

A. Yes, on their sidings, or to their main tracks.

Q. Was that custom observed as to your company—shipments made by your company up to February, 1910?

A. Yes, sir; prior to that we never had any request to switch a car refused.

Q. How much experience did you have as a railroad man?

A. Twenty years.

Q. In what capacity?

A. I was Purchasing Agent of the Henderson Road for twenty years.

Q. What has been the custom among the roads leading into Louisville in regard to switching and delivery of material of other roads brought in from—

Defendant objects, but the court overrules the objection, to which the defendant excepts.

A. The universal custom is to switch a car over to the line purchasing the material—set the car over when it reaches Louisville to their tracks.

215 Q. What was the custom in 1909, 1910, 1911 and 1912, leaving out what was done with your company?

A. The custom was to deliver the car loaded with the material to the company purchasing the material.

Q. And allow that company to take the material on in the same car in which it arrived in Louisville? Is that correct or not?

A. That is correct; that is a fact.

Q. Did or not the L. & N. Railroad Company observe that custom in any dealings with the Louisville, Henderson & St. Louis Road before it bought that road?

A. Invariably; without exception during the time I was with the road. We had hundreds of cars of lumber billed over the tracks of the L. & N. to the Henderson Road and they were promptly turned over to the Henderson Road to be taken out over their tracks and distributed as company material. We had hundreds

of cars of steel rails from Pittsburgh which came over the L. & N. tracks to Louisville and were set promptly over to the Henderson Road tracks and allowed to go over their tracks for distribution. In twenty years' experience I never knew a case to the contrary. I never heard of a connecting carrier that had a car transferred at the expense of the company getting the material.

Q. Were those interstate or intrastate shipments?

216 A. Interstate.

Q. What would be the effect if the cars were delivered on the team track of the Louisville & Nashville Railroad Company and unloaded there? What would be the effect on you?

A. It would depend, of course, upon what disposition we wished to make of the particular ties delivered to us on the team track.

Q. Suppose you sold them to the Pennsylvania or the Big Four roads?

A. It would be necessary to unload the ties with teams and haul them across the city and reload them in cars, or deliver them on the right-of-way of those roads.

Q. What expense would that incur to you?

A. At least five cents per tie.

Q. How much per car?

A. \$15.

Q. You have named a number of customers that you had in Louisville to which you said that circular prohibited you selling to. I will ask you whether or not they had sidings or connections upon which the L. & N. could have switched the cars?

A. In the time before this controversy with the L. & N., we sold to all of those people, and either billed the ties to ourselves in Louisville and asked the L. & N. to switch them to the point where those people asked them to be switched, or billed di-

217 rectly to them and they attended to the switching of the cars.

Q. I ask you whether or not they had physical connections or tracks so they could be switched over?

A. Yes, sir.

Q. You spoke of being presented—among the shippers you couldn't further ship to was the Louisville Railway Company. Was that company a customer of yours?

A. Yes, sir.

Q. Was there any advantage in selling ties to the Louisville Railway Company—that is, a street-car company?

A. Yes, sir.

Q. Was there any advantage in selling to them?

A. There were two advantages in selling to the street car company. The first is they used a smaller tie and it made a market for the inferior tie. In the second place, the Louisville & Nashville Railroad Company although maintaining the high freight rate on ties on interstate traffic, and although maintaining since the order of the Kentucky Railroad Commission the lumber rate on ties wholly in the State of Kentucky, for some reason made a lower rate, lower than the lumber rate, on ties for the Louisville Railway Company, and on that account we were forbidden by this circular to get the

benefit of this lower rate. We have shipped no ties to Louisville under the lumber rate since this rate went into effect.

Q. Let me understand you. You say the L. & N. freight rate ties for the Louisville Railway Company was less than the lumber rate?

218 A. Less than the lumber rate. We have a tariff showing that.

Q. These ties, you say, are smaller than the L. & N. ties?

A. They are ties which the L. & N. doesn't care for.

Q. What was the reason the L. & N. fixed lower rates on those ties for the Louisville street car company?

A. Because they didn't use that.

Defendant objects and the court sustains the objection and directs the jury not to consider the last answer of witness.

Q. I believe you said the L. & N. refused to deliver ties shipped by your company in carload lots to the Pennsylvania Company at Louisville unless the higher rate of freight was paid, or unless the ties were unloaded.

A. Yes; if we would pay the high rate of freight, they would set the car over without any request for transfer, but if we refused to pay the high rate of freight, they would require the ties transferred.

Q. I will get you to give the jury an instance or two of the difference between the lumber rate and the fifth class rate as shown by the L. & N.'s charges, as compared with the price of ties?

A. Take Bowling Green or Smiths Grove, Kentucky. Smiths Grove is a place from which more ties are shipped than Bowling Green, and the L. & N. lumber rate is 8 cents per hundred.

219 Their rate on cross ties if four times that, or 32 cents per 100 pounds. The value of a Pennsylvania cross-tie, white oak cross-ties, at Louisville, Kentucky, is 82 cents. Of that 82 cents—

Q. Where is that value, at Louisville or Smith's Grove?

A. In Louisville. Of that 82 cents, 16 cents would be absorbed in freight, if shipped on the lumber rate, and 64 cents would be absorbed in freight if shipped on the tie rate, the fifth class rate, which was their tie rate. That applies to the white oak tie. A large part of the business in ties now is what we call the creosote-tie. It is made of inferior woods, and not used without treatment, and it has to be sent to various plants established over the country for creosoting them and giving them a longer life. It is a cross-tie the same size as the Pennsylvania, 7 by 7 by 8, worth 55 cents in Louisville, and the freight on same would be 64 cents. On- other point named in our petition, decided by the Interstate Commerce Commission, was Cookeville, Tennessee. The lumber rate from Cookeville, Tennessee, to Cincinnati is 17 cents per 100; the fifth class rate is 46 cents per 100 pounds. If that tie is shipped on the lumber rate to Louisville or Cincinnati, the price for the tie being the same in either place, 26 cents of the value of the tie would be taken in freight if shipped on the lumber rate, and the tie which would bring 82 cents in Cincinnati, would have 92 cents freight on it;

shipped on the fifth class rate, the tie worth 55 cents in Cincinnati would have 92 cents freight attached to it when it reached Cincinnati.

Q. Do you mean to say the L. & N. freight charges are 37 cents more than the value of the tie from Cookeville?

Defendant objects and the court sustains the objection, to which the plaintiff excepts.

Q. Tell the jury the difference then, or how much more the freight is than the value of the tie when it reaches Cincinnati?

Defendant objects, but the court overrules the objection, to which the defendant excepts.

A. In the case of a white oak tie, shipped from Cookeville, Tennessee, to Cincinnati, the freight would be 10 cents more than the value of the tie at Cincinnati. In the case of a creosoted tie the freight would be 37 cents more than the value of the tie.

Q. How does the value of cross-ties on which the L. & N. charge this fifth class rate compare with the value of lumber of the same kind on which they charge the lumber rate?

A. A cross tie which brings 80 cents or 82 cents in Louisville contains 40 feet, board measure, of lumber which makes it worth \$20 a thousand feet in Louisville. A car of quarter sawed oak would be worth \$75 or \$80 a thousand in Louisville.

The COURT: Is quarter sawed oak the only kind of lumber that comes in the lumber rate.

The WITNESS: No.

The COURT: If you were to saw an oak tie, would you have quarter sawed oak?

The WITNESS: The heart of the tree, which makes quarter sawed oak, goes into the tie.

The COURT: Is it the same grade of wood? Of course, it is a white oak. Could you saw up a railroad cross tie and get quarter sawed oak out of it?

The WITNESS: No; you can saw up the same tree and get quarter sawed oak and the tie both.

The COURT: It is a different grade of lumber although it comes out of the same tree?

The WITNESS: It is a much higher grade.

The COURT: That is, the lumber is?

The WITNESS: Yes, sir.

Defendant objects, but the court overrules the objection, to which the defendant excepts.

A. If a car—taking again the illustration of Smiths Grove, car of quarter sawed oak—

Mr. BRUCE: What do you mean by quarter sawed oak?

The WITNESS: Like that desk; it is sawed against the grain so as to get that figure.

Mr. BRUCE: By quarter sawed oak, do you mean the oak has been sawed into quarters?

The WITNESS: Yes; I mean the lumber; the lumber after it has been manufactured it is quarter sawed oak.

Defendant objects, but the court overrules the objection, to which the defendant excepts.

A. (cont'd). A car of quarter sawed lumber worth \$7 5a thousand, containing 40,000 feet, which would be the same amount that would be contained in a car containing 250 cross-ties would be moved from Smiths Grove to Louisville by the L. & N. for \$32. A car worth \$750, which could be damaged to that extent by a wreck, would be moved to Louisville for \$32. A car of white oak cross ties worth in Louisville \$200 would be moved by the L. & N. from Smiths Grove for \$160 a carload; a car of creosote-ties worth 55 cents, or \$137.50 a car, would be moved by the Louisville & Nashville Railroad Company from Smiths Grove to Louisville for \$160.

Q. Do you know of any traffic reason why the rate on cross ties should be different from the rate on lumber?

223 A. If there was any reason it would be in favor of the lower rate on cross-ties than on the lumber, on account of the less value of products and the less likelihood that it could be damaged in transit.

Q. During your time as paymaster on the Henderson Road, did you ever know of an instance where the road was compelled to pay a loss on lumber, or a loss in a wreck or a damage by transportation, or on cross-ties?

A. None; claims were paid for damage on lumber in transportation but never in the case of cross ties.

Q. Which of the two is more likely to be injured?

A. The lumber.

Q. What has been the custom of the L. & N. during the years in question here about requiring cars carried over its lines to Cincinnati, to be unloaded?

Defendant objects, but the court overrules the objection, to which the defendant excepts.

A. In 10 or 12 years' experience in shipping ties out of Eastern Kentucky to Cincinnati, I have never known of a single case in which the Louisville & Nashville Railroad Company or any other railroad has required that cars of ties delivered in Cincinnati be transferred to cars belonging to the line to which the ties are shipped before being allowed to be shipped forward over its line. Not a single case.

224 Q. What is the difference then between the practice of the L. & N. in delivering your cars going to Louisville without loading and those going to Cincinnati?

A. They have required them to be transferred at Louisville if shipped to the Pennsylvania, but have not required that they be transferred at Cincinnati if shipped to the Pennsylvania Railroad.

Q. Does that difference you speak of—that practice apply to you or everybody between Louisville and Cincinnati?

A. Everybody.

Q. They never then required you to have your cars unloaded when they reached Cincinnati and transferred to other cars?

A. No, sir; you understand these ties are shipped from the place where they voluntarily maintain the lumber rate on ties.

Q. You mean by the answer before the last that everybody is required to transfer the cars at Louisville?

A. Nobody else has been required to transfer cars at Louisville so far as I know.

Q. Nobody else than whom?

A. Than the Ohio Valley Tie Company; we were the only people however—it ought to be fair to state that in the last two years we have been the only people shipping ties out of this territory to Louisville.

Q. Who has been the largest dealers in ties on the L. & N. in the last four or five or six or seven years?

A. On that part of the L. & N. south of Louisville—west 225 and south of Louisville, in which they had attempted to enforce these high rates, we have been practically the only competitors of the L. & N. Railroad in the purchase of ties.

Q. What became of the others—the other competitors of yours?

Defendant objects, but the court overrules the objection, to which the defendant excepts.

Q. Were there others?

A. There were several tie companies started in business on the L. & N. Railroad—

Defendant objects and the court sustains the objection, and directs the jury not to consider the answer.

Q. Mr. Bush, how long would it take to effect a change in the tariff in the event a road decides to make a change in its rates?

A. Under the rules of the Interstate Commerce Commission, if a railroad company wishes to advance its rates it has to give 30 days' notice, and it is a practice among railroad- in case they wish to make a reduction in a rate to telegraph to Washington for authority. They can change their rates in an hour by telegraphing to Washington.

Q. After the decision of the Interstate Commerce Commission rendered last April, in which the L. & N. was directed, as you have shown, to put the ties on the lumber rate, did the L. & N. dis-
continue the practice of requiring you to unload the cars
226 at Louisville?

A. No; no, they continued to require the cars to be unloaded.

Q. Did they discontinue the practice of refusing to allow you to ship in Pennsylvania Railroad cars when the ties were intended for the Pennsylvania Road?

A. They still refuse to accept Pennsylvania cars, and use L. & N. cars.

I will get you to explain the custom of railroads in regard to

I ought to state here, in connection with that, however, that filled some of these cars—we had one contract which required Indianapolis delivery. We billed those cars through to Indianapolis, on those cars billed through to Indianapolis I found one or two Pennsylvania cars in the number.

I want you to explain what the custom of the railroad and L. & N. included, is about shipping goods along their line in of other roads, how they utilize, if at all, the cars of the other?

defendant objects, but the court overrules the objection, to which defendant excepts.

Of course, if a railroad company has ample supply of its own equipment, it will naturally hold its own cars, but there are times when the business is dull enough on the railroad so as to load their cars on distant roads so as to get them off their lines, and get the per diem charge on the other lines. That is often done in ordinary times when their equipment is being used and there is no surplus of equipment. They will pick up the cars, for instance, or near the point where the ties are to be loaded, and get them back with that car, instead of hauling it back empty, deliver the car loaded with ties for the Pennsylvania or the Big Four. The case may be, in a Pennsylvania or a Big Four car. In the case of Pennsylvania or Big Four cars, the custom is to pick up other cars of other companies whose home is north of the Ohio River. For instance, if they have a Michigan Central car or a Lake Shore car down on the line of the L. & N. near the point where ties are to be loaded to the Pennsylvania Railroad or some other road in the north, the custom would be to get a load out of this car by loading it with ties and sending it in the direction of its home. In the absence of that and in the absence of a desire to furnish their own equipment, they call on the Pennsylvania Railroad or the Big Four Railroad to furnish cars for its own material. That has been the ordinary custom with us, and we have worked, until this trouble came up, entirely in harmony with the L. & N. and with their trainmasters and with their agents and with the Pennsylvania with the view of getting Big Four and Pennsylvania equipment for Pennsylvania and Big Four ties.

Apply that to a concrete case. Suppose you had a lot of ties shipped from Smith's Grove, and they had some empty Pennsylvania cars?

A. The ordinary custom would be first to load the Pennsylvania cars with the material going to the Pennsylvania Railroad. That would be the natural custom.

Would the road make or lose by that?

It would gain by that, because they would haul the car back with a load which paid them freight rather than haul it back empty and deliver it to the Pennsylvania earning nothing on the car.

Q. Suppose they had cars of other roads north of the Ohio river and no cars of their own down there?

A. That would naturally apply, too, otherwise they would return the car to the junction point, Louisville, for instance, with nothing in it and getting nothing out of the movement of the car, whereas loading it with ties for the Pennsylvania Railroad they would get a freight haul and get earnings out of the movement of the car.

Q. At the time the L. & N. refused to use the Pennsylvania cars at various times, was or not the L. & N. well supplied with its own cars or were they short of cars?

A. The reason why I applied to the L. & N. officials in regard to the matter—

The COURT: Just answer the question.

The reporter reads the question to the witness.

A. Ever since this controversy with the L. & N. arose, there was nothing but a complaint of shortage of L. & N. cars on our business.

Q. Complaints from whom?

229 A. With the L. & N. Road. When we asked for cars they would say they were short of equipment and couldn't furnish them.

Q. Did the L. & N. ever unload Pennsylvania cars after they reached Louisville loaded with your ties, brought in over the L. & N. Road?

A. Yes, sir.

Q. Explain now what occurred, and how many cars, if there were more than one?

A. It seemed that in spite of instructions of officials of the L. & N. to the agents, at times by mistake they loaded Pennsylvania cars—that having been the former practice—and during the time that has elapsed since this controversy arose, 24 cars of ties have been loaded on the lines of the L. & N. Road in Pennsylvania cars, the ties being billed to the Pennsylvania Railroad at Louisville, Kentucky.

Q. Who shipped those ties?

A. The Ohio Valley Tie Company. Those cars have been brought to Louisville instead of being sent over to the Pennsylvania Railroad in Pennsylvania cars, they have invariably been unloaded by the L. & N. in the L. & N. yards, transferring the ties from the original Pennsylvania cars into L. & N. cars and then the L. & N. cars sent over to the Pennsylvania with an order that the car must be unloaded and returned.

Q. How many cars were done that way?

A. Thirty-four cars.

230 Q. Do you know the object of the L. & N. in unloading the Pennsylvania cars—the ties from the Pennsylvania cars and putting them into L. & N. cars and then turning the L. & N. cars over to the Pennsylvania Road at Louisville?

A. They seemed willing to spend money to make us spend it.

Q. Have you any letters from the L. & N. people showing that these cars were thus unloaded from the Pennsylvania cars into the

& N. cars, and then the L. & N. cars set on the Pennsylvania line?

A. I have letters covering some cars, but most of the evidence is in the form of the original bills of lading showing what cars the ties are loaded into and then the expense bills showing what cars they reached the Pennsylvania in.

Q. Pick a sample of some writing from them showing that fact. Just read one and put that in as a sample.

A. Here is a letter from the Car Accountant.

Q. Did you write to the Car Accountant?

A. Yes, sir.

Q. Read the letter to him first.

A. The copy of our letter is not here.

Q. Read his answer.

Witness reads the letters as follows:

"LOUISVILLE, KY., Dec. 5, 1911.

31 Ohio Valley Tie Co., City.

GENTLEMEN: Refer to your letter November 24th tracing shipment ties from Smith's Grove, Ky. loaded in P. F. W. & C. car #526578 October 17th. The contents of this car were transferred at this point into L. & N. #2246 and delivered the Pennsylvania Lines October 26th.

Yours truly,

E. L. HILL.

"LOUISVILLE, KY., Dec. 5, 1911.

Ohio Valley Tie Co., City.

GENTLEMEN: Contents of Erie car #97995 referred to in your letter November 24th were transferred at this point into L. & N. #376 and delivered the Pennsylvania Lines October 26th.

Yours truly,

E. L. HILL."

Said letters are filed herewith as Exhibit- T #1 and T #2.

32 A. (cont'd). Then there are 34 other cars covered by bills of lading and expense bills.

Q. I notice in mentioning the cars in which those ties arrived in Louisville, the initials are given?

A. Yes.

Q. What did those initials indicate? What road?

A. The cars belonged to the Pennsylvania System, and the ties were transferred from the cars belonging to the Pennsylvania system to the L. & N. cars and set over to the Pennsylvania tracks with an order that the cars must be unloaded and the empties returned.

Q. You have detailed the acts of which you complain as having been committed by the L. & N. I will ask you what effect those acts had upon your business of shipping ties over the L. & N.?

A. The effect of those orders on their part was to put us entirely out of the interstate business. We could no longer ship ties to points

L. & N., in regard to prompt or slow delivery of cars when called for by you for shipment of ties?

A. We have had difficulty from the date of the filing of the injunction suit to the present time in the matter of being furnished with cars to load with cross-ties, and that has been particularly noticeable in the matter of these Pennsylvania deliveries.

Q. How was it before this controversy arose?

A. We had no trouble because they accepted—if they had no equipment available of their own, they accepted empty cars from the Pennsylvania and Big Four at Louisville which they hauled empty to the point where the ties were, to be loaded with ties to be returned to those companies.

Q. What effect did the slowness in furnishing cars for the hauling of ties have upon the ties themselves?

A. The ties deteriorated very rapidly when they were left along the sidings.

Q. Did they or not deteriorate?

A. They did.

Q. About how many ties remained on the sidings, waiting for shipment, for which you could not get cars?

A. We had on the O. & N. Division of the L. & N. a large number of ties purchased for the Pennsylvania Railroad Company after the Pennsylvania had made several attempts to get work done by inspectors in that territory, they sent a man there for a week getting only one car; as an illustration, their chief inspector came to Louisville and refused any longer to send inspectors to the territory.

Q. How many ties were then on the right of way?

A. About 30,000.

238 Q. How many of those deteriorated?

A. About 20,000 of them are left there now.

Q. What were they worth after the deterioration?

A. Nothing. I don't mean that they would be of no value if they could be moved—if they were at some other point but the value was decreased and they can't be moved even at the lumber rate, to make anything out of them. The ties would be of some service—

Q. What was the loss in dollars and cents to the Ohio Valley Tie Company by reason of those ties rotting?

A. \$10,000.

Q. What did you do with the rest of the 30,000 ties?

A. We used those ties in filling our contract with the Nickel Plate Railroad. Although the Nickel Plate Railroad uses what is known as the standard tie, which is 6 by 8 by 8½ these were ties 7 by 8 by 8½ feet long, and in order to get the best we could out of them, when we could get no Pennsylvania inspector, we sent those ties subject to inspection to the Nickel Plate, until our contract was filled, and paid the high rate—paid the fifth class on them.

Q. Did you sell any of them to the L. & N.?

A. We sold to contractors of the L. & N. all they would take.

sold to Messrs. Bond Brothers, who were contractors of the L. & N. all they would take of them at prices 10 to 15 cents under what they were worth if they were sold to the Pennsylvania.

Q. How many were destroyed?

A. About 10,000 that we sold to Bond Brothers.

Q. About how many were destroyed?

A. 20,000.

Q. Then, you valued those at 50 cents a tie?

A. Yes, sir; at 50 cents a tie; 50 cents is what they cost us. They were worth 62 cents if they could have been shipped out on the lumber rate, because the rate is 10 cents, which would make 72 cents a tie, and they are worth 82 cents in Louisville.

Q. Have you any letters from Mr. Phelps, the Superintendent of the Louisville & Nashville Railroad Company, or Mr. Anderson, the Superintendent at Paris, in regard to this question of cars and ties?

A. Yes, sir.

Q. Go ahead, Mr. Bush, and read those letters?

A. On December 20, 1911, we received a letter from the Superintendent of Transportation, Mr. Phelps.

Q. Of what road?

A. The L. & N. Road.

The witness reads the letter as follows:

"LOUISVILLE, KY., December 20, 1911.

Ohio Valley Tie Co., Louisville, Ky.

GENTLEMEN: This is to acknowledge receipt of your favor of December 19th, enclosing copy of letter from Mr. J. H. Dean, dated Richmond, Ky., December 18th.

The order for 12 cars for loading cross ties at East Bernstadt is completed today with cars delivered by the Penna. R. R. at Cincinnati. Another order was placed on December 14th, for five cars, and the Penna. people at Cincinnati promise us to complete this order promptly.

The general demand for equipment has been such that we have found it necessary to call on connecting lines as was done in the case of the order from East Bernstadt for cars to load their Company cross ties. The Penna. people have been slow in filling these orders, due, so they say, to the heavy demand for equipment. If Mr. Dean can use additional cars for these cross ties, and will let us have his orders, we will take pleasure in either calling on the Penna. for them, or furnishing the cars from equipment picked up on the line if the situation is such that this can be done.

With reference to the foreign cars he reports coming into East Bernstadt loaded with merchandise, these cars, although taken away from East Bernstadt, are used at other points for other loading than cross ties going to some railroad who would be glad to furnish the equipment for their own ties.

241 During times when cars are scarce it has always been customary for railroads to furnish cars for loading their cross ties, as well as their company coal.

I do not anticipate any trouble in furnishing Mr. Dean all the cars he wants between now and the first of the year, and after that time lines to whom the ties are destined will undoubtedly be glad to furnish the equipment promptly.

Yours truly,

C. B. PHELPS."

242 Said letter is filed herewith as Exhibit U.

A. (Cont'd.) This, of course, applies to Eastern Kentucky territory, where we have had no controversy with the L. & N.

Q. Who is Mr. Dean?

A. Our manager at Richmond, Kentucky.

Q. I will ask you whether or not the L. & N. used the cars of other roads to take your freight to Cincinnati?

A. To Cincinnati, yes, sir; this other letter has reference to the same thing.

Q. Read that.

The witness reads letter as follows:

"PARIS, Ky., Dec. 22, 1911.

Mr. J. H. Dean, Richmond, Ky.

DEAR SIR: Your letter of 18th instant in regard to cars wanted at East Bernstadt for loading ties to Pennsylvania Lines, Cincinnati.

Your orders were placed with the Pennsylvania Railroad Company promptly, and the delay has been on account of that line not furnishing cars promptly.

On the 21st instant, our agent at East Bernstadt reported
243 that the order for 12 cars was filled on December 20th, and two cars received same date on the order for five more on December 14th.

As the Pennsylvania Company is now furnishing some cars on these orders, we shall probably be able to complete your orders this week.

Yours truly,

W. H. ANDERSON,
Superintendent."

Said letter is filed herewith as Exhibit V.

244 Q. You say that the L. & N. would accept Pennsylvania cars for the Eastern Kentucky. What did they do for Southwestern Kentucky? Would they or not accept Pennsylvania cars to sell your ties in?

A. They would not. They used only L. & N. cars.

Q. Did you receive any notification from the L. & N. people in regard to the ties that were on the Owensboro & Nashville Division?

A. Yes, sir; we received a letter from the Roadmaster of that division.

Q. Show that to Mr. Bruce and read it in evidence.

The witness reads the letter as follows:

"RUSSELLVILLE, KY., Nov. 20, 1912.

Ohio Valley Tie Co., Louisville, Ky.

GENTLEMEN: I have information that your Company has a good many cross ties stored on our station grounds at the following places:

Epley, Edwards, Lewisburg, Wolf Lick, Diamond Springs, Dunmor, Penrod, Twin Tunnels, Belton, Island.

I understand some of these ties have been where they are for more than two years. They are very much in the way of handling business at these stations and if they are not moved in the next thirty days, I will move them at your expense, and of course in doing so I will have to rent a small piece of land, large enough to hold the ties near our station grounds at the best price I can and will charge you actual cost of handling and rental of ground. Please let me know if this is satisfactory to you and whether it is or not, I will have to act as above stated, as patrons of our road are crowded out and put to a great expense and inconvenience on account of these ties being in the way.

In the future I wish you would instruct your agents and others putting ties on for your Company to keep them off of our station grounds unless they will be shipped promptly and in case they do put them there and they remain there, we will have to charge you rent or storage for the ties left there.

Yours truly,

L. M. LANNIN,
Roadmaster."

Said letter is filed herewith as Exhibit W.

A. (Cont'd). To that letter we replied as follows:

"Dec. 3, 1912.

Mr. L. M. Lannin, Road Master, L. & N. Railroad, Russellville, Ky.

DEAR SIR: Your letter of the 20th ult. received and carefully noted.

It is true that we have had a large number of ties stored at stations on the O. & N. Division for many months. It is not true, however that this is the result of any fault of ours, as we have repeatedly ordered cars for these ties and organized leading forces for the purpose of moving them. Usually it has been impossible to get cars at all, but occasionally we have received one of two cars on orders for a large number of cars and these have been loaded and moved out.

The ties piled along your line are under contract to the Penn-

sylvania Lines and the Big Four R. R. and we have repeatedly offered the officials of your Company at Louisville, Pennsylvania and Big Four cars to be loaded with these ties. Not only has your company refused to accept them, but they have refused to furnish anything but L. & N. cars and when these cars have reached Louisville

they have required that the ties be transferred before they
247 can be delivered to the Pennsylvania Lines or the Big Four R. R. When we have billed cars out of the State of Kentucky to points north of the Ohio River, they have charged us a freight rate in many instances greater than the value of the ties.

Your Company has also issued a circular against us cutting us off from the privilege of shipping ties to various concerns in Louisville.

Until your company began their warfare on us, we were moving the ties from your territory as fast as they were purchased and were doing a very profitable business, but as a result of their discrimination the ties which are now there are badly damaged or ruined and we have been subjected to great loss. You may, perhaps know that we have brought suit for heavy damages against your company, hoping that we may be at least partially recompensed for the destruction of our business.

However, we are now anxious to have the ties inspected and shipped out, provided your Company will furnish cars in such quantities as will warrant the Railroad tie inspectors remaining in your territory, and we would be pleased to have, by return mail, some guarantee that your Company will furnish sufficient cars for loading these ties promptly.

248 Upon receipt of this information we will organize a large leading force and move out such ties as have not been so damaged as to be rejected by the Railroad Tie inspectors.

Yours truly,

OHIO VALLEY TIE CO."

Said letter is filed herewith as Exhibit X.

249 A. (Cont'd). Their answer is:

"RUSSELLVILLE, KY., Dec. 7, 1912.

Mr. C. P. Bush, President, Ohio Valley Tie Co., Louisville, Ky.

DEAR SIR: Your letter of the 3rd, relative to moving ties from our station grounds. I did not know and do not know that you are having any trouble with this Company and in fact this is none of my business. I have charge of our right of way and station grounds and I do know that our shippers and myself are badly handicapped by these ties being in the way, and I thought it only right that I make some move to try to get them out of the way and I hope you can see your way clear to do so in the near future.

Yours truly,

L. M. LANNIN, Roadmaster."

Said letter is filed herewith as Exhibit Y.

A. (Cont'd). Another letter from us reads:

"Dec. 11, 1912.

L. M. Lannin, Road Master, L. & N. Railroad, Russellville, Ky.

DEAR SIR: Your favor of the 7th at hand.

While it may be true that the trouble we have been having with your Company is none of your business, you cannot possibly lose sight of the fact that it is necessary that we be furnished with cars in order to move the ties.

Last week we maintained a loading force and kept a Pennsylvania inspector in your territory one week and received one car for loading. We are advised at the same time your Company was loading your ties in box cars in the same territory. Would it not have been easy for you to have divided your empty equipment with us? It is still your intention to move our ties off of your right-of-way at the end of the thirty days mentioned in your former letter, without reference to the fact that your Company will not furnish us cars to load them?

Kindly advise as to this.

Yours truly,

OHIO VALLEY TIE CO.

Said letter is filed herewith as Exhibit Z.

Q. What is the date of that last letter?

A. December 7, 1912.

Q. Mr. Bush, what about the occurrence of your shipping certain ties from East Bernstadt to Cincinnati instead of to Louisville?

A. We commenced to buy on the L. & N. at East Bernstadt and we looked at their tariff and found the lumber rate was 10 cents per 100 pounds, and the lumber rate to Cincinnati was 11 cents per 100 pounds. We had a right to deliver ties on our contract with the Pennsylvania either at Louisville or Cincinnati. We sent 22 cars from East Bernstadt to Louisville on which they charged us 34 cents per 100 pounds, their fifth class rate instead of the lumber rate, and a surcharge of 2 cents per 100 pounds. When we discovered this was so, that they were doing this, we, of course, changed the billing of these ties to Cincinnati, where the rate was only 11 cents per 100 pounds and shipped no more ties to Louisville, Kentucky.

Q. How many did you ship to Louisville and pay the 34 cents per 100 pounds?

A. 22 cars.

Q. How many then did you ship to Cincinnati on the 11 cents per 100 pounds?

A. We shipped—I have forgotten the number of cars, but we shipped enough ties to Cincinnati so that the additional freight of 1 per cent per 100 pounds caused by shipping the cars to Cincinnati instead of to Louisville, was \$581.46.

Q. At 1 cent per 100 pounds?

A. Yes, sir; that would be about 100 cars, at five or six dollars a car.

Q. What is the distance from East Bernstadt to Louisville, and from East Bernstadt to Cincinnati?

A. The distance is about the same; it is about 15 miles shorter to Louisville than to Cincinnati.

Q. State whether or not the course pursued by the L. & N. which you have detailed, since February, 1910, against your Company, profited the L. & N. from a financial point of view?

Defendant objects and the Court sustains the objection, and counsel for plaintiff says he will withdraw the question.

Q. Before the Ohio Valley Tie Company went into L. & N. territory to buy ties, what was the price of ties which the producers of ties got for their ties—the usual market price?

Defendant objects and the Court overrules the objection, to which the defendant excepts.

A. At the time we went on the L. & N. Railroad to do business, they had no competition in the territory south of Louisville—

The stenographer reads the question.

A. They were paying from 35 cents to 45 cents under somewhat different conditions for cross ties—

Defendant objects but the Court overrules the objection, to which the defendant excepts.

Q. What do you mean by "under somewhat different conditions"?

A. The L. & N. had a practice in those days of giving the producer of ties just what they could give him and get him to get out the ties.

The COURT: I will sustain an objection to that, and direct the jury not to consider that answer.

Q. State what the values were and nothing else?

The COURT: He has already stated that.

Q. Mr. Bush, what was the L. & N. paying for ties along its line, and what was the market price along its line at the time immediately before you entered the field as its competitor to purchase ties?

Mr. BRUCE: What do you mean by "you"?

Mr. BASKIN: His Company.

Mr. BRUCE: What Company?

Mr. BASKIN: The Ohio Valley Tie Company.

Defendant objects but the Court overrules the objection to which the defendant excepts.

A. They were paying on the Greensburg—the Lebanon Branch of the L. & N. just before we went into the territory 35 cents to the producer for a 7 x 9 x 8 1/2 white oak tie.

Q. What was the market value?

254 A. That was the market value based on the 5th class rate to Louisville, but if the producer had had the benefit of the lumber rate, that was 20 cents under the value of the ties.

Q. What were they paying, and what was the market value of ties along that road generally, irrespective of that one branch you have spoken of?

A. 10 to 15 cents less than the market value of the ties if the producer had been able to ship them on the lumber rate.

Q. What were the ties worth? If you went down there and paid man cash for ties then and there, what was the market price?

A. At the time they had this 35 cent contract, the ties were worth 30 cents in Louisville, if shipped on the lumber rate.

Q. I want to leave Louisville and the shipping out. 35 cents—now, then, what was the value of those same ties after you became a competitor—the market value for the same character of ties, I mean?

A. Shortly after we went in, the price was 55 cents; they paid 55 cents, and now they are paying 60 cents.

Q. Then I will ask you to state what the exact advance was from the time, just before you went into the territory, and after you entered it, what was the exact advance in cents per tie?

A. From 35 cents to 60 cents, or 25 cents a tie.

Q. What is the mileage of the L. & N. in Kentucky?

A. The mileage of the L. & N. in Kentucky, over which the high freight rates obtain, is 1117 miles.

Q. What is the usual number of ties used per mile?

A. It is 400 ties per year for renewals per mile. And adding 100 ties to that for new construction would make 500 ties a year, which is a small number of ties for the L. & N. to use per mile per year in the State of Kentucky.

Q. How much would the total be under that mileage in Kentucky—the total number of ties?

A. 558,500 ties a year in the State of Kentucky.

The COURT: How many ties are there to a mile in construction?

A. 2816 ties; the ties are two feet apart, and an extra tie at the joint, makes 2816 ties to the mile.

Q. Have you any contracts showing what the L. & N. paid for those ties—L. & N. contracts, prior to the time you became a competitor?

A. Yes, sir.

Q. Exhibit them to Mr. Bruce, and file a sample.

The witness hands papers to counsel for the defendant.

Q. I will ask you to add the freight on the ties which you have mentioned as 35 cents—the freight to Louisville on the lumber rate—and say what they would be worth in Louisville?

A. The tie at 35 cents on the Greensburg Branch would weigh 200 pounds, and the lumber rate is 9 cents a 100 pounds, making that tie worth in Louisville 53 cents.

Q. What was the market price in Louisville at that time?

A. 72 cents.

Q. That is the difference of 19 cents?

A. Yes, sir.

Defendant objects to the introduction of the contracts, but the court overrules the objection, to which the defendant excepts.

Q. Mr. Bush, what was it worth to put those ties into the cars instead of on the right of way, the ones mentioned in these written contracts that we have here?

A. We pay 1 cent for loading a small tie, 6 x 8 x 8 tie; one cent and a half for loading those covered by this contract.

Q. Take the price covered by these contracts, and add the loading price and the freight to Louisville, the lumber rate, and tell what the tie would stand in Louisville. Just take one as a sample?

A. Here is a contract dated October, 1908, which is the
257 date of our appearance on the L. & N. Railroad in the tie business, a contract with G. H. Shipp for 5,000 L. & N. ties, at 35 cents for No. 1 ties, and 17 1/2 cents for No. 2 ties, delivered on the ground at their stations.

Q. Add the cost of loading on the cars of these 35 cent ties?

A. Calling 2 cents the cost of loading instead of a cent and a half, would make that a 37 cent tie.

Q. And the freight to Louisville on a lumber rate?

A. 18 cents, making that tie worth 55 cents in Louisville.

Q. What was the market price of those ties in Louisville at that time?

A. Here is a Pennsylvania contract, or a voucher of the Pennsylvania Railroad, showing that on that day they were paying us 80 cents for this tie at Louisville.

Q. A difference of 25 cents?

A. Yes, sir.

Q. Now, file three of the latest of those contracts?

A. I have another contract which is a little bit different from the others, showing that at the time they were paying 35 cents for the ties on the Greensburg Branch of the L. & N. Railroad, along the right of way, that some people made a contract for ties to be delivered at Bluff Boom, at the River, in which case they could be floated to Evansville at 15 cents more, and where they had
258 competition they gave 15 cents more.

Said contracts are filed herewith as Exhibits 1, 2, 3 and 4.

(Here follow Exhibits 1, 2, 3, and 4, marked pages 259 to 262, inc.)

between G. H. Shipp, Contractor, of the first part, and the Louisville and Nashville Railroad Company, by J. F. Burns, Roadmaster, of the second part.

The Contractor agrees to furnish For Thousand (10,000) Gross-Ties to the Railroad Company accordance with the following conditions:

1. The Ties to be of sound, thrifty White Oak, Post Oak, or Chestnut Oak, hewn smooth and straight to act thickness, with parallel faces throughout, and to be without deep score marks.
2. Ties made from deadened, decayed, or worm eaten, timber will not be accepted.
3. The Ties shall be $8\frac{1}{2}$ feet long, 7 inches thick, and not less than 8 inches wide, and shall show not less than 5 inches width of heart wood on the faces. The bark shall be removed from the unhewn sides of pole Ties, and Ties cut from large timber shall be hewn on all four sides. Ties must not vary more than $\frac{1}{2}$ inch from 7 inches in thickness, and must not vary more than 1 inch from 8 feet 6 inches in length; both ends must be sawed square.
4. The Ties must be delivered on the right of way or depot grounds at places convenient for loading them on cars. They must not be placed on ground more than 2 feet below the grade of the roadbed, nor more than 8 feet above. They must be piled in cribs, about fifty ties to the pile, in layers with eight ties one way, and two the other, with ends of Ties of eight tie layers to the track. The piles, or cribs, must have a space of at least four feet between them to permit of easy inspection.
5. Ties conforming to the above specifications will be accepted as first-class Ties. Serviceable Ties not conforming closely to the above specifications will be accepted as second quality Ties. Ties made of other timber than that mentioned herein will not be accepted.
6. The Ties shall be inspected, accepted, and marked, or branded, by the Railroad Company's inspector before being paid for.
7. For all Ties conforming strictly to the above specifications, the Railroad Company will pay 50 cents per Tie. For serviceable Ties, not conforming closely to the above specifications, classed as second class Ties, the Railroad Company will pay 25 cents per Tie.
8. An inspection and count of the Ties delivered during any month shall be made on or about the end of that month, and payment for accepted Ties will be made on regular pay-day of the month following, when the Company's pay car is on the road, at point most convenient for receiver of account. Payment shall be made only to parties furnishing the Ties, and to no others.
9. The above number of Cross-Ties shall be delivered on the Greensburg Branch,

Railroad Company agrees to furnish G. H. Shipp, Contractor, time
pass good between Lebanon and Greensburg during life of this con-
tract, said pass to be part of consideration.
between the 20th day of March, 1907 and 1st day of Jan., 1908.

IN WITNESS WHEREOF, the parties have signed their hands the day above written.

Witness: Neal Edelen

G. H. Shipp

LOUISVILLE & NASHVILLE RAILROAD CO.

Witness: E. H. Drain

By J. F. Burns,

Roadmaster.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

CROSS-TIE CONTRACT.

Memorandum of an Agreement, made on 20th day of March 1907

between G. H. Shipp, Contractor, of the first part, and the Louisville and Nashville Railroad Company, by J. F. Burne, Roadmaster, of the second part.

The Contractor agrees to furnish ~~for~~ ten thousand (10,000) Cross-Ties to the Railroad Company in accordance with the following conditions:

1. The Ties to be of sound, thrifty White Oak, Post Oak, or Chestnut Oak, hewn smooth and straight to exact thickness, with parallel faces throughout, and to be without deep score marks.
2. Ties made from deadened, decayed, or worm eaten, timber will not be accepted.
3. The Ties shall be 8½ feet long, 7 inches thick, and not less than 9 inches wide, and shall show not less than 5 inches width of heart wood on the faces. The bark shall be removed from the unhewn sides of pole Ties, and Ties cut from large timber shall be hewn on all four sides. Ties must not vary more than ½ inch from 7 inches in thickness, and must not vary more than 1 inch from 8 feet 6 inches in length; both ends must be sawed square.
4. The Ties must be delivered on the right of way or depot grounds at places convenient for loading them on cars. They must not be placed on ground more than 2 feet below the grade of the roadbed, nor more than 8 feet above. They must be piled in cribs, about fifty ties to the pile, in layers with eight ties one way, and two the other, with ends of Ties of eight tie fastens to the track. The piles, or cribs, must have a space of at least four feet between them to permit of easy inspection.
5. Ties conforming to the above specifications will be accepted as first-class Ties. Serviceable Ties not conforming closely to the above specifications will be accepted as second quality Ties. Ties made of other timber than that mentioned herein will not be accepted.
6. The Ties shall be inspected, accepted, and marked, or branded, by the Railroad Company's inspector before being paid for.
7. For all Ties conforming strictly to the above specifications, the Railroad Company will pay 50 cents per Tie. For serviceable Ties, not conforming closely to the above specifications, classed as second class Ties, the Railroad Company will pay 25 cents per Tie.
8. An inspection and count of the Ties delivered during any month shall be made on or about the end of that month, and payment for accepted Ties will be made on regular pay-day of the month following, when the Company's pay car is on the road, at point most convenient for receiver of account. Payment shall be made only to parties furnishing the Ties, and to no others.
9. The above number of Cross-Ties shall be delivered on the Greensburg Branch,

Railroad Company agrees to furnish G. H. Shipp, Contractor, time
pass good between Lebanon and Greensburg during life of this con-
tract, said pass to be part of consideration.
between the 20th day of March, 1907 and 1st day of Jan., 1908.

IN WITNESS WHEREOF, the parties have put their hands the day above written.

Witness: Neal Edelen

G. H. Shipp

LOUISVILLE & NASHVILLE RAILROAD COMPANY

CROSS-TIE CONTRACT.

Memorandum of an Agreement, made on 20th day of March, 1907. 19__
between G. H. Shipp, Contractor, of the first part, and the Louisville and
Nashville Railroad Company, by J. F. Burns, Roadmaster, of the second part.

The Contractor agrees to furnish Two Thousand (2000) Cross-Ties to the Railroad Company
in accordance with the following conditions: Pln Oak

1. The Ties to be of sound, thrifty ~~White Oak, Red Oak, Chestnut, or Hickory~~ White Oak, hewn smooth and straight to exact thickness, with parallel faces throughout, and to be without deep score marks.
2. Ties made from deadened, decayed, or worm eaten, timber will not be accepted.
3. The Ties shall be $8\frac{1}{2}$ feet long, 7 inches thick, and not less than 9 inches wide, and shall show not less than 5 inches width of heart wood on the faces. The bark shall be removed from the unhewn sides of pole Ties, and Ties cut from large timber shall be hewn on all four sides. Ties must not vary more than $\frac{1}{2}$ inch from 7 inches in thickness, and must not vary more than 1 inch from 8 feet 6 inches in length; both ends must be sawed square.
4. The Ties must be delivered on the right of way or depot grounds at places convenient for loading them on cars. They must not be placed on ground more than 3 feet below the grade of the roadbed, nor more than 8 feet above. They must be piled in cribs, about fifty ties to the pile, in layers with eight ties one way, and two the other, with ends of Ties of eight tie layers to the track. The piles, or cribs, must have a space of at least four feet between them to permit of easy inspection.
5. Ties conforming to the above specifications will be accepted as first-class Ties. Serviceable Ties not conforming closely to the above specifications will be accepted as second quality Ties. Ties made of other timber than that mentioned herein will not be accepted.
6. The Ties shall be inspected, accepted, and marked, or branded, by the Railroad Company's inspector before being paid for.
7. For all Ties conforming strictly to the above specifications, the Railroad Company will pay 45 cents per Tie. For serviceable Ties, not conforming closely to the above specifications, classed as second class Ties, the Railroad Company will pay 27-1/2 per Tie.
8. An inspection and count of the Ties delivered during any month shall be made on or about the end of that month, and payment for accepted Ties will be made on regular pay-day of the month following, when the Company's pay car is on the road, at point most convenient for receiver of account. Payment shall be made only to parties furnishing the Ties, and to no others.
9. The above number of Cross-Ties shall be delivered on Greensburg Branch.

between the 20th day of March, 1907 and 1st day of Jan. 1908.

IN WITNESS WHEREOF, the parties have set their hands the day above written.

Witness: Neal Edelen

G. H. Shipp

LOUISVILLE & NASHVILLE RAILROAD CO.

Witness: E. H. Drain

J. F. Burns,

Roadmaster.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

CROSS-TIE CONTRACT.

Memorandum of an Agreement, made on 20th day of March, 1907.

between G. H. Shipp, Contractor, of the first part, and the Louisville and Nashville Railroad Company, by J. F. Burns, Roadmaster, of the second part.

The Contractor agrees to furnish Five Thousand (5000) Cross-Ties to the Railroad Company in accordance with the following conditions:

1. The Ties to be of sound, thrifty White Oak, Post Oak, or Chestnut Oak, hewn smooth and straight to exact thickness, with parallel faces throughout, and to be without deep score marks.
2. Ties made from deadened, decayed, or worm eaten, timber will not be accepted.
3. The Ties shall be $8\frac{1}{2}$ feet long, 7 inches thick, and not less than 9 inches wide, and shall show not less than 5 inches width of heart wood on the faces. The bark shall be removed from the unhewn sides of pole Ties, and Ties cut from large timber shall be hewn on all four sides. Ties must not vary more than $\frac{1}{2}$ inch from 7 inches in thickness, and must not vary more than 1 inch from 8 feet 6 inches in length; both ends must be sawed square.
4. The Ties must be delivered on the right of way of depot grounds at places convenient for loading them on cars. They must not be placed on ground more than 2 feet below the grade of the roadbed, nor more than 8 feet above. They must be piled in cribs, about fifty ties to the pile, in layers with eight ties one way, and two the other, with ends of Ties of eight tie layers to the track. The piles, or cribs, must have a space of at least four feet between them to permit of easy inspection.
5. Ties conforming to the above specifications will be accepted as first-class Ties. Serviceable Ties not conforming closely to the above specifications will be accepted as second quality Ties. Ties made of other timber than that mentioned herein will not be accepted.
6. The Ties shall be inspected, accepted, and marked, or branded, by the Railroad Company's inspector before being paid for.
7. For all Ties conforming strictly to the above specifications, the Railroad Company will pay 60 cents per Tie. For serviceable Ties, not conforming closely to the above specifications, classed as second class Ties, the Railroad Company will pay 30 cents per Tie.
8. An inspection and count of the Ties delivered during any month shall be made on or about the end of that month, and payment for accepted Ties will be made on regular pay-day of the month following, when the Company's pay car is on the road, at point most convenient for receiver of account. Payment shall be made only to parties furnishing the Ties, and to no others.
9. The above number of Cross-Ties shall be ~~delivered~~ floated down Green River and

delivered at Bluff Boom, Ky.

between the 20th day of March, 1907 and 1st day of Jan. 1908

IN WITNESS WHEREOF, the parties have set their hands the day above written.

Witness: Neal Edelen

G. H. Shipp

LOUISVILLE & NASHVILLE RAILROAD CO.

By J. F. Burns,

Roadmaster.

Witness: E. H. Train.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

CROSS-TIE CONTRACT.

Modification of an Agreement, made on 1st day of October, 1908

between G. H. Shipp, Contractor, of the first part, and the Louisville and

Nashville Railroad Company, by J. F. Burns, Agent, of the second part.

The Contractor agrees to furnish \$5,000 Cross-Ties to the Railroad Company in accordance with the following conditions:

1. The Ties to be of second, thirdly White Oak, Post Oak, or Chestnut Oak, hewn smooth and straight to exact thickness, with parallel faces throughout, and to be without deep score marks.
2. Ties made from deadened, decayed, or worm eaten, timber will not be accepted.
3. The Ties shall be 8 1/4 feet long, 7 inches thick, and not less than 9 inches wide, and shall show not less than 8 inches width of heart wood on the faces. The bark shall be removed from the unheven sides of pole Ties, and Ties cut from large timber shall be hewn on all four sides. Ties must not vary more than 1/8 inch from 7 inches in thickness, and must not vary more than 1 inch from 8 feet 6 inches in length; both ends must be sawed square.
4. The Ties must be delivered on the right of way on depot grounds at places convenient for loading them on cars. They must not be placed on ground more than 2 feet below the grade of the roadbed, nor more than 8 feet above. They must be piled in cribs, about fifty ties to the pile, in layers with eight ties one way, and two the other, with ends of Ties of eight tie layers to the back. The piles, or cribs, must have a space of at least four feet between them to permit of easy inspection.
5. Ties conforming to the above specifications will be accepted as first-class Ties. Serviceable Ties not conforming closely to the above specifications will be accepted as second quality Ties. Ties made of other timber than that mentioned herein will not be accepted.
6. The Ties shall be inspected, accepted, and marked, or branded, by the Railroad Company's inspector before being paid for.
7. For all Ties conforming strictly to the above specifications, the Railroad Company will pay 35¢ per Tie. For serviceable Ties, not conforming closely to the above specifications, classed as second class Ties, the Railroad Company will pay 17-1/2¢ per Tie.
8. An inspection and count of the Ties delivered during any month shall be made on or about the end of that month, and payment for accepted Ties will be made on regular pay-day of the month following, when the Company's pay car is on the road, at point most convenient for receiver of account. Payment shall be made only to parties furnishing the Ties, and to no others.
9. The above number of Cross-Ties shall be delivered on the Greensburg Branch.

Railroad Company agrees to furnish G. H. Shipp, Contractor, time pass good between Lebanon and Greensburg, during life of this contract, said pass to be part of consideration.

Between the 1st day of October, 1908 and 1st day of January, 1909

IN WITNESS WHEREOF, the parties have set their hands the day above written.

Witness L. W. Shipp.

G. H. Shipp

LOUISVILLE & NASHVILLE RAILROAD CO.

Witness,

L. P. Landrum.

By J. F. Burns, Rm.

Exhibit No 4
G. H. Shipp
Official Stenographer

263 Q. Have you any other contracts of the nature of the three just filed?

A. I have some others which show the same facts, written at the same time.

Mr. BRUCE: What is this? (Referring to one of the exhibits).

The WITNESS: That is ties; I filed that to show what we were paying for them at that time. That is in my testimony, that voucher.

Mr. NORMAN: We want that filed.

The defendant objects, but the court overrules the objection, to which the defendant excepts.

Q. Mr. Bush, did you ever have any conversation with Mr. Woerney, the Assistant Chief Engineer of one of the branches of the L. & N., about the value of ties in 1908, about the time you went on the road?

A. In 1908, the early part of 1909, we had at Crofton, Kentucky, 40,000 cross ties. Our agent at Crofton, Kentucky, was asked—

The COURT: Were you present when your agent was asked something?

The WITNESS: No.

The COURT: I sustain an objection to that.

264 Q. Just tell what you did, Mr. Bush?

A. I understood the L. & N. wanted to purchase ties. So went to Mr. Mapother's office.

Q. Who is he?

A. He is Vice President of the L. & N. Road. I told him that we have these 40,000 ties at Crofton, and that we would sell him those ties at just what they were worth to us in Louisville, less the freight, and he seemed to be interested and asked me to go to Mr. Woerney in regard to the matter. I went to Mr. Woerney and showed him the prices we were receiving in Louisville.

Q. What was that price?

A. 80 cents; and I showed him the freight rate.

Q. What was it?

A. 10 cents a 100 pounds, or 20 cents a tie, and figured 1 cent for loading, and offered him the ties at 59 cents. Mr. Woerney told me they had never paid over 45 cents for a tie on the Henderson Division, and he did not think they ever would. We shipped the ties to the Pennsylvania Road on the lumber rate.

Q. Has your Company, the Ohio Valley Tie Company, suffered any loss or damage by reason of the time consumed by yourself and officers of your Company in attending to this litigation, and to the various troubles which you have detailed?

Defendant objects.

The COURT: What do you mean by "this litigation?"

265 Mr. BASKINS: Excluding this particular case—other litigation.

Defendant objects, but the court overrules the objection, to which the defendant excepts.

A. We suffered a severe loss in our territory in Kentucky on Kentucky River.

The reporter reads the question.

The COURT: I will sustain an objection as to the "various trouble

Q. Have you made any loss by reason of the loss of time the officers and employes of the Ohio Valley Tie Company in losing after litigation with the L. & N., arising out of this controversy omitting, however, this particular law suit?

A. Yes, sir.

Q. Now then, state what it was? State what the time was, and what the loss was?

Defendant objects, but the court overrules the objection, to which the defendant excepts.

A. This injunction suit came up in September—the latter part of August or the first of September, 1911—

The COURT: Why wouldn't that be covered by a bond?

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Counsel for plaintiff reserves the question.

Q. Mr. Bush, did or not your Company sustain a loss by reason of having to look after, or looking after the transfer of various ties from car to car?

A. It did.

Q. After the ties reached Louisville?

A. It did.

Q. What was the amount of loss sustained for that?

Defendant objects, but the court overrules the objection, to which the defendant excepts.

A. We expended at Louisville for pay-roll for transferring to the Pennsylvania—

Defendant objects, but the court overrules the objection, to which the defendant excepts.

A. (cont'd). It was necessary for us to give over the time of our salaried men to this business.

Q. What did that cost your company?

A. \$200.

Q. Now then, what cost, other than that salary, were you put in having these ties transferred from car to car?

A. The cost was \$771.56.

Q. In addition to the other \$200?

A. Yes.

267

Q. What was the amount of loss—how much in money did your Company sustain of loss, on account of shipping these cars to Cincinnati on the 11 cent rate, instead of to Louisville at the 10 cent rate, or the addition of 1 cent per 100 pounds? What did that amount to in dollars and cents?

A. \$581.46.

Q. I will ask you during this period from 1908, whether

road in Louisville except the L. & N. ever put ties on the 5th class rate instead of on the lumber rate?

A. No, sir.

Defendant objects, and the court sustains the objection as repetition.

Q. I will ask you whether or not any road during that time last mentioned, except the L. & N.—other than the L. & N. now, ever required the shippers to transfer ties from one car to another car before they allowed the same to pass to connecting carriers?

A. No, sir.

Defendant objects, and the court sustains the objection and instructs the jury not to consider the answer.

Q. Has it been the custom of any other road in the time mentioned, coming into Louisville, except the L. & N., to refuse to load ties into cars of other roads when those cars were empty, and
68 at the stations where the ties were to be started from?

Defendant objects, and the court sustains the objection, to which the plaintiff excepts.

Q. Has any other road in Louisville in that time unloaded ties from the cars in which they were brought to Louisville, and put those ties into other cars, and then turned those cars over to connecting roads, where they are shipped to the other roads?

Defendant objects, and the court sustains the objection.

Q. Did any other roads coming into Louisville during the time mentioned refuse to receive shipments when directed in care of any other road at Louisville?

Defendant objects and the court sustains the objection, to which the plaintiff excepts.

Q. Did any other road refuse to receive these shipments intended for the Louisville Street Railway Company, or the Louisville & Jeffersonville Bridge Company, or the K. & I. Bridge Company, or the Hydraulic Brick Company.

Defendant objects, and the court sustains the objection.

Q. I will ask you, Mr. Bush, to state to the jury any special damages you have sustained, omitting attorneys' fees, because the court has ruled that out?
89

The Court: I sustain an objection to that.

Q. Mr. Bush, you have stated—

The Court: I sustain an objection to that.

Q. Did or not your Company sustain any loss by reason of the business which it lost from the Pennsylvania Railroad Company because this fight began with the L. & N.?

A. Yes, sir.

Defendant *excepts*, and the court sustains the *exception*, to which the plaintiff *excepts*, and makes the following avowal:

Avowal. Plaintiff avows that the witness, if permitted to answer the question, would state, and that it would be true, that the company was damaged by reason of the loss of business which it otherwise would have obtained from the Pennsylvania Railroad.

Q. I will ask you to state the amount of the loss which your Company sustained on account of the loss of business which might have been obtained from the Pennsylvania Railroad Company?

Defendant objects, and the court sustains the objection, to which the plaintiff *excepts*, and makes the following avowal:

270 Avowal. Plaintiff avows that the witness, if permitted to answer the question, would state, and the same would be true, that by reason of the acts of the L. & N. Railroad Company the plaintiff lost business amounting to \$300,000 in one year, ending September 1, 1912, and that the value of that business was \$18,000 net profit.

Q. Mr. Bush, what has your Company been damaged by reason of being deprived by the alleged acts of the defendant, of the customers from whom you have been in the habit of purchasing ties along the line of the L. & N.?

Defendant objects, and the court sustains the objection, to which the plaintiff *excepts*, and makes the following avowal:

Avowal. Plaintiff avows that the witness, if allowed to answer the question, would state, and it would be true, that he estimates that his company has sustained at least the loss of \$100,000 by reason of having its customers taken from them by acts of the defendant, which acts the witness has heretofore detailed in his evidence.

271 Q. Mr. Bush, will you state what attorneys' fees you paid for carrying on your contest with the Louisville & Nashville Railroad Company before the Interstate Commerce Commission for the recovery of the freight charges?

Defendant objects.

A. \$1,600.

Q. Were those fees reasonable or unreasonable?

A. Reasonable; there was a great deal of work.

Q. The Nickel Plate Road had no terminus at Louisville, did it connect tracks?

A. No, sir.

An adjournment was here taken until 9 o'clock tomorrow morning.

Resumed at 9 o'clock Tuesday morning, April 22, 1913, with witness C. P. Bush still on the stand, under cross-examination by Mr. Helm Bruce.

Q. Mr. Bush, I believe you have said that you were an old railroad man before you went into the tie business?

A. Yes, sir.

Q. And the Ohio Valley Tie Company was organized in 1903?

A. Yes, sir.

Q. And went to doing business on the line of the L. & N. in 1908?

A. Yes, sir.

Q. At the time the Ohio Valley Tie Company was organized, and at the time it began doing business on the line of the Louisville & Nashville Railroad Company, you were able to read and understand the railroad tariffs, weren't you?

A. Yes, sir.

Q. Isn't it true, Mr. Bush, that in 1908, and prior to 1908, the tariffs of the Louisville & Nashville Railroad Company on interstate traffic — had been filed with the Interstate Commerce Commission at Washington, and published, provided that cross ties should be treated 5th class, and charged for accordingly?

A. It is true. It didn't appear in its regular tariff. That matter, afterwards discovered, is handled in a different way in their tariff. In this way: The Louisville & Nashville Railroad Company is a party to the Southern Classification of freight, which is issued by the Southern Classification Committee, and that Southern Classification Committee is formed and continued for the purpose of putting various articles shipped as freight in the same class for the convenience of the railroads. There is nothing in the Louisville & Nashville Railroad Company's tariff anywhere showing the rates on cross ties, except at points where they have made a special cross tie rate, like points in Eastern Kentucky. The tariff of the L. & N. covering cross ties is governed by an exception to the Southern Classification. It doesn't appear at all in their tariff. In order to find out what the rate on ties on the L. & N. is, it is necessary to get a copy of the Southern Classification, and get a copy of the exceptions to the Southern Classification, and find where the L. & N. has made an exception on ties, and find in what class that exception puts the ties by an ordinary perusal of the L. & N. tariff. Now you couldn't tell what the tariff was. That classification is in the hands of the ordinary shipper; those classifications do not go to him, and the exceptions as used, are not given to the ordinary shipper, so, it is impossible, without going to the L. & N. office and getting the classification, and getting the exceptions to the classification, and finding out where the exception was made by the L. & N., to know that cross ties were not under the lumber rate.

The whole thing though,—that is, what you call the Southern Classification and the exceptions to the Southern Classification together, constitute the L. & N. tariff?

Yes, sir.

And that is filed with the Interstate Commerce Commission at Washington, isn't it?

A. I suppose so.

Q. And by these two things together, the L. & N.'s tariff on interstate traffic, puts cross ties in the 5th class, doesn't it?

A. Yes, sir.

Q. And that has been true ever since prior to 1908, hasn't it?

A. Yes, sir.

Q. And isn't it true that—

A. I want to qualify that to this extent: My attention has never been called to this matter, and I never made any examination of that Southern Classification until the issue which I have here of 1910; I have never seen the ones before that, and have never seen the L. & N. exception. This which I have, and which I now know to be a fact, was issued in 1910. I haven't seen the tariff of the L. & N. before that time. The rule of exception was, it was my supposition for two years, until this matter came up, that the ties were on the lumber rate, and I did business under that rate.

Q. Which is the tariff you have reference to now, and which you say was in force in 1910? What is its effective date?

A. It is effective August 1, 1910.

Q. Southern Classification?

A. Southern Classification No. 38, on page 169, under the head of exceptions to classifications for the L. & N., appears this item: "Cross and switch ties, 5th class rate." I have never seen a copy of the Southern Classification before that.

Q. You could have seen it by applying to the L. & N.?

A. I had no cause for applying, because they were moving our stuff at lumber rate.

Q. You could have seen it by applying to the Interstate Commerce Commission at Washington, could you not?

A. Yes, sir.

Q. Have you since this controversy arose with the L. & N. made any investigation as to the rate—I mean as to the published tariff rate of the Louisville & Nashville Railroad Company, on cross ties and interstate commerce, prior to 1910?

A. No, sir.

Q. You don't know then whether or not prior to 1908 the Louisville & Nashville Railroad Company had its own local classification of cross ties in interstate commerce, putting them in the 5th class freight?

A. No, sir.

Q. You don't know anything about that?

A. I don't know anything about that.

Q. If it be true, Mr. Bush, that prior to 1910, the Louisville & Nashville Railroad Company did, in its published tariff filed with the Interstate Commerce Commission, publish cross ties as in the 5th class of freight, you know it to be a fact, do you not that the Louisville & Nashville Railroad Company could not give rate on cross ties less than the published rate, without the consent of the Interstate Commerce Commission?

Plaintiff objects, but the Court overrules the objection, to which the plaintiff excepts.

Q. You know that to be a fact, do you not?

The reporter reads the question.

Q. I will modify the question. Assume the facts to be as I have stated, you knew between 1908 and 1910, that the Louisville & Nashville Railroad Company could not give to to any one shipper rates on cross ties other than the published rates on file with the Interstate Commerce Commission?

A. I assume that they are obliged to charge the published rate, but for two years they charged us the lumber rate, which I assumed to be the published rate.

Q. I believe you filed with the Interstate Commerce Commission in September, 1911, a complaint against the Louisville & Nashville Railroad Company, did you not?

A. Yes, sir.

Q. Based on the fact that it had charged the 5th class rate on cross ties in interstate commerce?

A. Yes, sir.

277 Q. That being the complaint out of which grew the order which you read yesterday, of the Interstate Commerce Commission?

A. Yes, sir.

Q. Which was made—that is, decided and the order made on April 8, 1912?

A. Yes, sir.

Q. The shipments on account of which that complaint was made, were shipments between May 27, 1910, and April 10, 1911, were they not?

A. Yes, sir.

Q. Constituting 91 carloads of cross ties?

A. Yes, sir.

Q. And that complaint was filed on September 15, 1911, wasn't it?

A. Yes, sir.

Q. And when that complaint was filed, it embraced all of the complaints which the Ohio Valley Tie Company then had against the L. & N. Railroad Company for excessive charge on cross ties, interstate shipments, did it not?

A. Possibly some cars, along towards the last that we hadn't received settlement on. It embraces everything in the office at the time that case was filed. Others have accumulated since, to the amount of several thousand dollars, but it included all that we had knowledge of at the time the complaint was filed.

278 Q. In other words, the complaint filed on September 15, 1911, embraced all the charges that the Ohio Valley Tie Company knew of against the Louisville & Nashville Railroad Company for excess charges on cross ties in interstate shipments?

A. Yes, sir.

Q. Now, the Interstate Commerce Commission held, according to the order which you have read, did it not, that the charges on those 91 cars had been excessive, and made an award of reparation of damages for the excess charges, didn't it?

A. Yes, sir.

Q. And that award has been paid by the Railroad Company, hasn't it?

A. Yes, sir.

The COURT: Did it make an award of damages or reparation?

The WITNESS: No damages; just simply the amount of the excessive freight.

Mr. Bruce reads from the order of the Commission, as follows:

"We further find that complainant made the shipments as set forth in the foregoing table and paid charges thereon at the rates herein found to have been unreasonable; that complainant has been damaged to the extent of the difference between the amount 279 which it did pay and the amount which it would have paid at the rates above set forth as lumber rates; and that it is therefore, entitled to an award of reparation in the sum of \$6,198 with interest thereon from the 21st day of April, 1911."

280 Q. Has the Ohio Valley Tie Company filed any complaint before the Interstate Commerce Commission since the complaint filed September 15, 1911?

A. The reason for that being, it is our supposition now, that they have abandoned their policy in regard to the 5th class rate entirely and put in the lumber rate effective on ties over its entire system and that their freight department will not require the hearing of formal complaint to the Interstate Commerce Commission, but will join in stipulation, stating the facts, and ask for the right to refund the money.

Q. It is a fact that no complaint has been filed with the Interstate Commerce Commission?

A. No complaint has been filed with them, but we have overcharges amounting to several thousands of dollars which have accumulated.

Q. How much do they amount to?

A. About \$4,000.

Q. That is complaints which you have against the Railroad Company for overcharges occurring since the shipments that were covered by the complaint filed September 15, 1911?

A. Or since we have knowledge of them.

Q. Then, it is true, isn't it, Mr. Bush, that all the complaints which the Ohio Valley Tie Company has presented to the Interstate Commerce Commission against the Louisville & Nashville Railroad Company for any excess charges on any shipments, have been satisfied?

281 A. Yes.

Q. The Interstate Commerce Commission decided your complaint of September 15, 1911, on April 8, 1912, didn't it?

A. Yes, sir.

Q. Have there been any, what you call overcharges or excessive charges, by the Louisville & Nashville Railroad Company, on Interstate shipments of cross ties since April 8, 1912?

A. Yes, sir.

Q. What?

A. Part of these claims that aggregate \$4,000 have accumulated on shipments of cross ties—you understand, the addition to the

diff was put in their new tariff effective February 13, this year, putting in the lumber rate on ties over its entire system. They used a tariff effective July 1st, in which they complied simply with the order of the Commission, and put in the lumber rate on only from stations named in that complaint. There were a great many other stations where high rates still applied. After July 1, 1912, we had no complaint for the reason that we didn't ship any ties after that time from any station other than those named in that petition, and up to July 1st,—because that order was effective July 1st—all shipments, interstate, ties were charged at a class rate.

Q. Then, there have been no charges made against you in excess of the lumber rate since July 1, 1912, anyhow?

A. We the other day—I presumed that was by mistake, however—we received notice the other day of a car shipped February 13th, in which the high rate was assessed. We assumed that was a mistake.

Q. With that exception there has certainly been no rates which you considered excessive rates, charged against the Ohio Valley Tie Company, since July 1, 1912?

A. It is possible there has been a car or two shipped from some station, but not any large number.

Q. Not, so far as you know, with the exception of the one instance?

A. No, sir.

Q. Did the Ohio Valley Tie Company ever file any complaint with the Interstate Commerce Commission, complaining generally of the classification of cross ties as the 5th class rate?

A. No, sir.

Q. And ask that it be taken out of the 5th class rate?

A. No, sir.

Q. You have said something here, Mr. Bush, about cross ties being shipped to Cincinnati by the L. & N. Railroad Company on lumber rates, and not on the 5th class rate?

A. Yes, sir.

Q. If that was true, was that not from certain specific points where a lumber rate on cross ties had previously been put in as commodity rates from those points?

A. Yes; the tariff from those points showed ties—it didn't put them in the lumber class, it simply had a column for ties, in which they named the same rates as the lumber rates.

Q. In other words, you said a while ago there had been for quite a while certain points from which cross ties were shipped by the Louisville & Nashville Railroad Company under commodity rate, which was the same as the lumber rate?

The COURT: What do you mean by "commodity rate"?

Mr. BRUCE: I mean the rate on a particular commodity, and not class.

A. Yes; I can explain that. In making up this classification, they make a whole lot of articles of freight which come under 1, 2, 3, 4, 5, and a whole lot that come under A, B, C, D and beyond that they cover a lot of articles as commodities, such as lumber.

The COURT: Is that correct, as Mr. Bruce says, that certain kinds of freight come under certain rates?

The WITNESS: Yes, sir; flour almost always comes under the commodity class. At the same time, these rates were in effect 284 Cincinnati, and they were not in effect from the same stations to Louisville, if for points beyond. The tariff was on to Cincinnati.

Q. What I mean to ask is if it is not true, from point of origin in the State of Kentucky, commodity rates have been published from time to time by the Louisville & Nashville Railroad Company in its tariff, giving cross ties a commodity rate which corresponds to the lumber rate from those points of origin?

A. They didn't cover it in that way. The natural way to cover it in the way you speak of would be to have a foot note in the tariff showing that from certain stations the L. & N. lumber rate would apply on ties. They don't cover this that way. They make a special column in the tariff for cross ties, the stations from which they apply these rates, the same as the lumber rate, and they show opposite the station, and under the head of cross ties the rate, which is the same as the column of lumber rates on the same page.

Q. All I want to get at, Mr. Bush, is this: These differences in Cincinnati, to which you have referred, were in strict conformity with the L. & N. published tariff filed with the Interstate Commerce Commission?

A. Yes, sir; covered by the tariffs.

Q. Have you any other bills of lading or expense bills than those which you have filed yesterday, showing that the rates 285 charged by the Louisville & Nashville Railroad Company on interstate shipments of cross ties from 1908 to 1910, were at lumber rates?

A. Yes; we have a good many other bills of lading and expense bills, but we have records on our books—we had a former practice of not keeping old bills of lading more than two years, but later we have been keeping them all. Some of our bills are not in existence, but we have other evidence to establish that fact.

Q. You have no bills of lading except those you filed yesterday?

A. Oh, yes, we have a great many more than that.

Q. Will you let us see some of the bills of lading you have?

A. I would have to get them out of our files, and bring them to you. We have a lot of them here. We have got a whole bunch of them here.

Q. Will you let us examine them, so we can put them in if we desire?

A. And if you wish, we will get you several hundred more, and bring them over.

Q. I want to see these you have here?

A. All right.

Q. You referred yesterday to some conversations you had with Mr. Phelps, of the Louisville & Nashville Railroad 286 Company. What was Mr. Phelps' connection with the Company?

A. Superintendent of Transportation.

Q. In which you said you had tendered to him certain Pennsylvania cars to be loaded with cross ties for the Ohio Valley Tie Company?

A. Yes, sir.

Q. When was that conversation?

A. It was shortly after—within a day or two after I received this letter.

Q. I just simply asked you about when that conversation was?

A. I should say about the 23rd or 24th of October, 1911.

Q. Just tell me exactly what was said in that conversation between you and Mr. Phelps?

A. I went first to Mr. Snider—

The court directs the witness to answer the question.

A. I went to Mr. Phelps' office to see Mr. Phelps personally, and I introduced myself to Mr. Phelps, and told him that we were not getting cars for loading ties, and he said he was short of L. & N. equipment. I then told him that I had come under the authority of Mr. Crome, the Superintendent of the Pennsylvania Railroad. I went to Mr. Crome's office, and then to Mr. Phelps' office.

287 I told him that Mr. Crome had authorized me to say that the Pennsylvania would furnish cars to load Pennsylvania ties, and that they could make an order on the Pennsylvania for the cars, and they would be furnished promptly.

Q. That, you say, was in October, 1911?

A. Yes, in October, 1911.

Q. That is the only conversation now that you referred to?

A. We were there quite a long time, and he said he had instructions from his superior officers not to use anything but L. & N. cars for that service, and he could not accept the Pennsylvania cars.

Q. That was subsequent to the time that you and the Louisville & Nashville Railroad Company—I mean the Ohio Valley Tie Company, and the Louisville & Nashville Railroad Company had litigation over the question of whether your shipments of cross ties were intra-state shipments or interstate shipments, wasn't it?

A. Yes, sir; subsequent to that time.

Q. In other words, the Ohio Valley Tie Company had brought a suit here in Louisville, involving certain shipments of cross ties, the Ohio Valley Tie Company insisting that they were intrastate shipments, and the Louisville & Nashville Railroad Company insisting that they were interstate shipments?

A. Yes, sir.

288 Q. And this conversation with Mr. Phelps was subsequent to that time?

A. Subsequent to that time.

Q. In your testimony yesterday you said in substance that after the Louisville & Nashville Railroad Company began charging and compelling you to pay the 5th class rates on cross ties in interstate commerce, the Ohio Valley Tie Company changed its methods of

doing business, and began shipping its ties to Louisville. Now when was that?

A. In August, 1910, after we received settlement from the Nickel Plate showing they had charged us \$7900 on those cars, \$1700 of which they refunded in the claims, and \$5200 of which we received from the Interstate Commerce Commission.

Q. The question was what was the change in your method of doing business?

A. Shipped the ties which were intended for the Nickel Plate road in care of the Big Four Railroad in Louisville, and paid the Louisville & Nashville Railroad Company freight to Louisville, and reconsigned the car to Erie, Pa.

Q. The business was practically the same character of business that it had been before, wasn't it?

A. Yes, sir.

Q. You, in the letter to Mr. Goodwyn, being the letter of October 3rd, 1911, which has been read in evidence, addressed to Mr.

289 M. Goodwyn, General Freight Agent of the Louisville & Nashville Railroad Company, say: "We have a market for

these cross ties, which ties are shipped to various points outside of the State of Kentucky, namely, Chicago, Ills.; Erie, Pa.; Detroit, Mich.; Battle Creek, Mich.", and other places which you mention there. Who were the purchasers constituting the market at those places?

A. The Nickel Plate Railroad was the purchaser at Erie, Pa.; The Michigan Central Railroad was at Battle Creek; the Pennsylvania and Big Four Railroads were the purchasers at Cincinnati and Indianapolis; the Indianapolis Traction & Terminal Company was purchaser at Indianapolis; the Street Railway System—electric system—was a purchaser at Indianapolis. What are the other places?

Q. New Albany and Jeffersonville, Ind., and Shirley, Ind.?

A. Shirley, Ind., was the Big Four. That is their plant for using the cross ties.

Q. Who were the purchasers at Jeffersonville?

A. We delivered cross ties at New Albany and Jeffersonville to both the Pennsylvania and Big Four.

Q. Who were the purchasers at Cleveland, Ohio?

A. The Nickel Plate or Big Four; both lines go there.

Q. At Chatfield, Ohio?

A. Chatfield, Ohio, was the Lake Erie & Western. Understand, all of these lines I have named there, with the exception of the Pennsylvania, are parts of the New York Central System, but they require different accounts of the billing of the going to different divisions of the New York Central System.

Q. Do you mean the Big Four and the Nickel Plate—

A. Not the Nickel Plate; the Nickel Plate and the Pennsylvania you leave out. They are all parts. The Michigan Central, the Lake Shore, the Lake Erie & Western and the Big Four are all parts of the New York Central System.

Q. In other words, the three systems involved were the Pennsylvania System, the Nickel Plate System, and the New York Central System?

1. They are practically our only customers; they take 95% of business.

2. You have filed here a circular called No. 2045 issued by the Louisville & Nashville Railroad Company, on September 20, 1911, the circular issued to the agents of the Louisville & Nashville Railroad Company, telling them not to accept ties consigned to the Ohio Valley Tie Company, care of certain railroad companies, or for rail-road deliveries in effect, naming the different roads, but saying they accept ties consigned to the Ohio Valley Tie Company, or ties consigned direct to any of those several railroad companies?

A. Yes, sir.

Q. You have said that kept you from supplying your local customers at Louisville. How did it prevent you?

A. Because it wasn't provided in that circular—the rules are laid out as to our shipments on the Louisville & Nashville Railroad Company. We can ship to those railroads, or we can ship to the Ohio Valley Tie Company, but beyond that we had no rights on the Louisville & Nashville Railroad Company as shippers.

Q. You could ship to any particular consignee in Louisville you wanted to, couldn't you?

A. Only under that circular. That circular lays down what we can do.

Q. I know, but you didn't understand that circular to mean if we had a consignment of freight destined for some particular individual in Louisville that you couldn't ship to that individual?

A. I did. The circular says on the back that it must be strictly construed. It doesn't leave any room for doubt.

Q. It says specifically that they can accept—

A. It also says specifically what I can do.

Q. It says that cross ties may not be accepted consigned to the Ohio Valley Tie Company, care of the Pennsylvania Company, or for Pennsylvania deliveries, or consigned to the Ohio Valley Tie Company, care of the C. C. C. & St. L., or Big Four Road, or rail-road for C. C. C. & St. L. deliveries, or Big Four deliveries; cannot be accepted consigned to the Ohio Valley Tie Company, care of

the Monon, or C. I. & L., or calling for Monon deliveries or C. I. & L. deliveries; cannot be consigned to the Ohio Valley

Tie Company, care of the B. & O. S. W., or calling for B. & O. S. W. Railroad deliveries. It does not say ties cannot be accepted

consigned to the Ohio Valley Tie Company, to the Louisville Railway Company, does it?

A. It says in the other column what we can do, and it doesn't say anything about the Louisville Railway Company.

Q. Don't you know, Mr. Bush, that that other column that you refer to, is simply intended to cover the delivery of cross ties shipped to railroads, and not to cover the entire subject of cross ties shipped to other purchasers than a railroad?

A. I do not. I emphatically do not. The circular strictly construed gives the list of shipments we can make, absolutely. It doesn't say you can accept any other—

Q. It doesn't say you can't accept any other—

A. It says what we can accept—

Q. Wait a minute. It doesn't say that the agent can not accept any cross ties shipped by you to any other than those in the right hand column?

A. It says what can be accepted, and therefore excludes all other.

Q. Don't you know the purpose of that was to avoid trouble about shipments of cross ties to railroads, and to tell the agents that while they could not accept cross ties consigned to the Ohio Valley

293 The Company care of those railroads, they would accept cross ties consigned directly to the railroads, or directly to the Ohio Valley Tie Company?

A. When I got the circular I went to your local office, and asked what it meant, and was told that delivery to the Ohio Valley Tie Company meant delivery on their team truck. If I shipped a car of ties to the Ohio Valley Tie Company at Louisville, and afterwards wanted to give them to the K. & L., or afterwards give them to the Louisville & Jeffersonville Bridge Company, or afterwards want to give them to the Louisville Railway Company, at their siding on Twenty-ninth street, I would have to haul those ties to those place.

Q. Did you ask the Louisville & Nashville Railroad Company if that circular meant that you could not ship goods or ties direct to the Louisville Railway Company?

A. I did not. I asked what that clause allowed me to do, and they said it allowed me to ship to ourselves at Louisville.

Q. You could ship to yourselves in Louisville?

A. Out on their team trucks at Ninth and Broadway.

Q. Did you ask them if you would have the privilege of shipping to any other party in Louisville, direct?

A. No, sir.

Q. You didn't ask that question?

A. No, sir.

Q. You say you had those local customers and didn't ask 294 if you could ship direct to those local customers?

A. I construed the circular to mean that I could not.

Q. You were out there to ask what the circular meant. Why didn't you ask that?

A. I thought the only avenue I had was to ship to myself at Louisville. I construed that circular just as Mr. Goodwyn puts on the outside, literally, as he says it must be construed, and I tried to get an outlet for my business under the only clause giving me a chance to do it, and that is to ship to the Ohio Valley Tie Company at Louisville.

Q. Although you had other Louisville customers, and although you say you construed that to mean you couldn't ship to other local customers, you didn't ask the Railroad Company for its meaning?

A. No, sir.

Q. You have referred to some time and some place where you said you waited a week for cars to be furnished to load cross ties into—last, I so understood you?

A. Yes, sir.

Q. What was the place and the time?

A. Those were the stations on the old O. & N. Division.

Q. That means Owensboro & Nashville Division?

A. Yes, sir.

Q. Running from Owensboro to Russellville?

A. It was December 2, 1911.

Q. Of whom did you make the request for cars?

A. Those cars are ordered from the Superintendent, or
usually from the Train Master of that Division.

Q. Who was that?

A. I don't know his name; he is at Russellville.

Q. Mr. Lannon?

A. Lannon is the Roadmaster, I think.

Q. Mr. Howard is the Superintendent, isn't he?

A. The Train Dispatcher usually, for that division. Through the
dispatcher's office, we usually make the request for cars.

Q. Of whom did you make that request?

A. The Train Dispatcher.

Q. You don't recall who that was?

A. No, sir.

Q. Was that request in writing?

A. No, sir; by telephone.

Q. How many cars did you ask for?

A. Our request for cars was for a continuous loading of cars; we
made a request for so many cars a day—so we could continually load
cars a day. We told him we could load four cars a day.

Q. For how long a time?

A. Two weeks.

Q. You have no writing on that subject at all?

A. I don't think I have. Sometimes requests—

Q. Who did the telephoning?

A. Mr. Wright, our man on that end of the road.

Q. Did you hear the telephoning?

A. No, sir.

Defendant moves the court to exclude the evidence of this wit-
ness with reference to the orders by telephone, and the court sus-
tains the objection, and directs the jury not to consider the state-
ments as evidence, because it is not based on the knowledge of Mr.
A.

Q. You said something about cross ties that were allowed to lay
the right of way, as I understand you, of the Owensboro &
Nashville Division of the Louisville & Nashville Railroad Company,
two years, or until they rotted. Did I understand that?

A. I didn't say that.

Q. How long had those cross ties been laying there that you testi-
fied rotted down there?

A. Probably a year.

Q. Where were they located?

A. At various stations on the O. & N. Division of the Louisville
& Nashville Road.

Q. Had you sold those cross ties at any time while they were lay-
ing there?

A. We had regular contracts covering those ties.

297 Q. Where had they been gathered from?

A. They had been produced along the lines of the Owensboro & Nashville Railroad.

Q. When had you made demands to carry those ties away?

A. We made several efforts to get cars; we constantly made efforts.

Q. Can you be any more definite than that, Mr. Bush? Do you know when you gave orders for cars to carry away those ties?

A. The supervision which I have of the business is general supervision at Louisville, and we made every effort possible, through all channels, even to the point of going—

Q. That is a very general statement. I am asking you to be specific. If you can, tell us when—tell us, in the first place, when those ties were put there?

A. They were put there at various times, of course; they were produced and hauled there at various times.

Q. But you say they were there a year. When did the year begin?

A. We have worked—ever since 1909 we have been buying ties and producing ties on the O. & N. Division of the Louisville & Nashville Railroad.

Q. You have said certain ties on the Owensboro & Nashville Division of the L. & N. Railroad laid there for a year and rotted.

When did that year begin that those ties lay there?

298 A. Those ties were probably produced in the Summer of 1911.

Q. Do you know that?

A. Oh, yes; I know the ties were produced in the summer of 1911, or in the spring of 1911.

Q. Can you be any more definite than that? Can you tell us when, in the spring or summer of 1911, any ties were carried there and how many were carried there at any particular time?

— They were being produced from timber that we had purchased, and being bought from purchasers at various stations all through that time, in the spring and summer of 1911.

Q. How long does it take for cross-ties to rot?

A. A cross-tie will rot, for the purposes of inspection, when laying it on the ground in the open—it will begin to speck when inspection is put on it, in six months.

Q. You pile the cross-ties up, you don't lay the cross-ties on the ground?

A. No; thinking we would ship these ties—we cob-ricked them to keep the air from getting to them. We didn't dare pile them as lumber is piled.

Q. When you found you were being billed, as you say, you could have gone there and piled them up so they wouldn't rot?

299 A. We figured all the time we would get the cars, or might get the cars, to ship them out, and we made every effort to do it, and that was all we could do to get them.

Q. And then, I understand you, you can't give me any time

any of those ties were put there, and can't give me any time
n you demanded cars to carry them away. Is that true?

he COURT: I sustain an objection to that.

Mr. Bush, can you tell me specifically, or within a week, I
say, when any ties were laid on the right of way of the Owens-
& Nashville Railroad by the Ohio Valley Tie Company, which
allowed to lie there for a year?

Every week in the Spring and Summer of 1912, because we
buying ties, and took them out all the time.

he COURT: 1912 or 1911?

he WITNESS: 1911.

When was any order given for cars to carry those ties away?

Repeatedly orders were given for cars.

How?

Through our representative in the territory, who has his

Of course, you don't know that yourself, do you?

I know it as well as I could. I had the knowledge of the facts.

I had him to come to Louisville, and say he couldn't get cars.

Q. All you know on that subject is what your representa-
tives said to you?

Yes, sir.

efendant moves the court to exclude from the consideration of
jury the testimony of this witness as to orders for cars made by
representatives, and the court sustains the objection.

he COURT: Did you make any personal effort to get cars?

he WITNESS: Oh, yes, sir.

he COURT: During that time?

he WITNESS: Oh, yes, sir.

What personal efforts?

I went to the L. & N. authorities and told them I couldn't get
for that business.

When?

Several times. We made every effort to get cars.

When?

I couldn't give you the date.

Have you any writing on that subject?

We asked him to help us in that letter.

What was the date of that letter?

I don't know; it is in that file.

Q. To what letter do you refer, Mr. Bush?

A. I refer to a letter which I wrote to Mr. Lannan in
answer to which he wrote me to the effect that he was

Is that your letter to Mr. Lannan of December 3, 1912?

Yes, sir.

That was seven or eight or nine months after you say the ties
been put there, wasn't it?

A. Oh, yes; we hadn't been able to move them. They are there yet.

Q. This is the letter which you refer me to now, that you wrote on that subject, was written a year and seven or eight months after the ties had been put there?

A. Yes, sir.

Q. Mr. Bush, you have handed me a large number of bills of lading issued by the Louisville & Nashville Railroad Company to the Ohio Valley Tie Company, along in 1909 and 1910, on which you say the lumber rate only was charged. Were those shipments of which you made complaint before the Interstate Commerce Commission, September 15, 1911, made in the same way that the shipments made in these bills of lading were?

A. Exactly the same way.

Q. Are all of these bills of lading which you have handed to me here this morning, bills of lading on the interstate shipments?

A. Interstate shipments; yes, sir.

Q. And were the bills of lading on those shipments made in 1909 and 1909, where you say you have mislaid or destroyed the
302 bills of lading, made in the same way that these are made out, which you have handed me this morning?

A. Yes; all on interstate shipments.

Q. You said something about the First National Bank withdrawing a line of credit from the Ohio Valley Tie Company?

A. Yes, sir.

Q. You mentioned the fact, Mr. Bush, that I am a Director of that bank?

A. I understand that you are.

Q. Yes, I am. Do you mean to testify to the jury that I have influenced that bank to withdraw your line of credit?

A. I hope not.

Q. Well, I have not.

A. I hope not.

Q. You do business with other banks in the city, do you not?

A. Yes, sir.

Q. You have not had difficulty in getting money which you wanted to borrow?

A. Yes, sir; we did. Our borrowing ability was cut down.

Q. By whom?

A. By the First National.

303 Q. Any other?

A. No, sir.

Q. You have spoken of the increase of the price of ties after you went into this business. Isn't it a fact that the price of ties all over the country has increased?

A. Yes, sir; ties are higher now than they were when we went into the territory.

Q. In fact, nearly all material used in railroad construction has increased, hasn't it, in the last year?

A. Yes, sir; but I think that the increase in price in ties has been less than almost anything else. There is not a material difference

between the price paid in 1908 and the price which the railroads are paying now. Two or three cents advance.

Q. Within what time? ?

A. In the last four years; there has been a two or three cent advance in the price paid for ties.

Q. Where?

A. At Louisville, delivered at the railroads.

Q. In other words, there has been only a two or three cents increase in the price of ties at Louisville in the last four years?

A. In the last four years.

Q. The price of ties all over the country has been increased, have they not? Not simply Louisville, but everywhere?

A. Yes; the big increase in the price of ties was before that time. The big increase in the price of ties took place probably in 1905 or 1906, and since then the price hasn't advanced to any very large extent. It is somewhat higher, but not any large amount per tie.

Redirect examination by Mr. BASKIN, the plaintiff:

Q. Mr. Bush, during the time of this controversy between your company and the L. & N., were there any other railroads coming into Louisville that put ties on the 5th class rate?

A. No, sir.

Q. Except the L. & N. and its system?

Defendant objects to the question, but the court overrules the objection, to which the defendant excepts.

Q. Since the adjournment of yesterday, have you found any other letters—since the adjournment at ten o'clock today, when the court took a little recess, have you found any further letter which you wrote?

A. Yes, sir; I found a letter in my file that I wrote to the Superintendent of the O. & N. Division of the L. & N., in regard to furnishing cars.

05 The COURT: What is the date of it?

The WITNESS: March 2, 1912.

Q. Read that letter to the jury?

A. On March 2, 1912, we wrote to Mr. W. P. Howard, Superintendent of the O. & N. Division of the L. & N., at Russellville, Ky., as follows:

The witness reads the letter as follows:

"LOUISVILLE, KY., March 2, 1912.

Mr. W. P. Howard, Supt.

L. & N. Railroad, Russellville, Ky.

DEAR SIR: Referring to the cross-ties which we have on the O. & N. Division at Lewisburg and other points which you have been insisting that we load out on account of the same congesting your yards, beg to advise that we sent a Pennsylvania Lines' tie inspector

10—824

to Lewisburg on the 13th of February to begin loading out ties, and up to this time he has been furnished only 22 cars while we are in position to load 3 or 4 cars per day at that point and do so until the yard is cleaned up provided we are furnished cars.

We therefore write to ask that if you are unable to supply us with your own cars if you will not make requisition on the Pennsylvania Lines at Louisville for this equipment, as they advise us that they are in shape to furnish the cars if we

upon.
Will you kindly advise us by return mail in regard to your plan for furnishing the cars for this business, as we are holding the ties for the Inspector as well as our own organization at Lewisburg with the ties to loading out the ties at that point, and the Pennsylvania Lines department is complaining that the Inspector is not accomplishing as much work on the O. & N. Division as he may do at other divisions where they are purchasing ties.

Awaiting your reply, we are,

Yours truly,

OHIO VALLEY TIE CO.

Said letter is filed herewith as Exhibit No. 5.

307 Q. Did you get an answer to that?

A. Yes, sir; this is the answer.

The Witness reads the letter as follows:

"RUSSELLVILLE, KY., March 4, 1901.

Ohio Valley Tie Co., Louisville, Ky.

GENTLEMEN: Your letter of 2nd. Will advise we placed orders for ties at Lewisburg today, and will continue to furnish the ties as fast as possible.

In regard to hauling Penna. cars to Lewisburg from Louisville That is a matter you will have to handle with our Superintendent of Transportation, Mr. Phelps.

Yours truly,

W. P. HOWARD
Superintendent

Said letter is filed herewith as Exhibit No. 6.

308 Q. Mr. Bush, Mr. Bruce asked you if you had paid the overcharges which you had claimed in every instance—Did you furnish you Pennsylvania cars in pursuance of that request in your letter?

A. No, sir.

Q. You never got them?

A. No, sir.

Q. You stated you had been paid overcharges for all claims before the Interstate Commerce Commission. I will ask you how much have been paid the amount of some \$8100, for which you have received judgment?

A. No, sir.

Q. That case is still pending?

A. That case is still pending.

Q. In the Supreme Court of the United States?

A. Yes, sir.

Q. I will ask you if you have not also filed a claim for the same claim before the Interstate Commerce Commission?

A. Yes, we have filed a claim. The points at issue in the \$8100 verdict is whether these shipments were interstate shipments, or intra-state shipments, we contending that the shipment ended at Louisville, and was an intra-state shipment, and the L. & N. contending that because it was shipped out as company material over the lines of the Big Four and Pennsylvania, that they were interstate shipments. If it should be decided at Washington that they were interstate shipments, and the judgment should be reversed, we have taken care of that by filing claim before the Interstate Commerce Commission, in order to get the money back, whether it is an interstate shipment or intra-state shipment. In any event we can get the money, but are held out of it all of this time.

Recross-examination by Mr. BRUCE for the defendant:

Q. I don't know whether you read to the jury the date of that letter to Mr. Lannan, of Owensboro & Nashville Division?

The COURT: Yes, he read the date of that, but he did not read the date of the answer.

The WITNESS: March 4th; two days later.

Q. In other words, your letter to Mr. Howard, the Superintendent of the L. & N. was March 2, 1912, and the answer to you—I mean to the Ohio Valley Tie Company—was March 4, 1912?

A. Yes, sir.

GEORGE P. SMITH was the next witness called on behalf of the plaintiff, and being first duly sworn, testified as follows, in response to questions by Mr. Baskin:

Q. What is your business, Mr. Smith?

A. Local Freight Agent of the C. I. & L. Railroad.

Q. Known as the Monon?

A. The Monon Road; yes, sir.

Q. Have you got any papers there relating to a shipment, an interstate shipment of ties, made by Fowler Brothers?

A. Yes, sir; I have.

Q. Will you state whether that shipment went through Louisville, and to where?

A. The shipment came to us on Mem. Bill made by the L. & N. Road.

Q. How was it first consigned?

A. It was first consigned—I will read the mem. bill as it is. It is dated, unfortunately, by the L. & N., as December 12, 1913; that is intended for 1913. L. & N. car No. 96,712, from Colesburg, Mo., consigned to the N. Y. C. & St. L. Railway Company, care of W. Johnson, Thomaston, Ind., routed C. I. & L., South Wanitah,

N. Y. C. & St. L., loaded with ties. We received a regular slip numbered D-462, of December—the typewritten
311 are blurred, but we received it on the 13th, December 1912. The date of the slip is the 12th, I guess. It is as Colesburg, way-bill 9, December 11th—

Mr BRUCE: What is this you are reading?

The WITNESS: I am reading the L. & N. slip-transfer slip line.

A. (cont'd). It is dated December 11th, but the year shown; car L. & N. 96,712; consignee, N. Y. C. & St. L. R. Company; destination, Thomaston, Indiana. Unfortunately forgot to put in the balance of the address, but it shows on the bill which accompanies the car, which was as follows: "Car W. Johnson." This car was forwarded on our train No. December 14, 1912. It is my own memorandum, and has to do with the L. & N. records. It was made by me this morning.

Q. Where was the original point of shipment?

A. Colesburg, Kentucky.

Q. Where was it first consigned?

A. It was first consigned to the N. Y. C. & St. L.

Q. At what station?

A. Thomaston, Indiana.

Q. Did it go through?

A. It did.

Q. Upon what rates did it go through, the 5th class rate lumber rate?

A. It was billed to us at 6 cents per cwt. We
312 through rate from Louisville, 11 cents, which is that made a through rate of 17 cents.

Q. Was that the lumber rate or not?

A. It was the regular lumber rate, so far as the Monon concerned. So far as the L. & N. is concerned, I couldn't say.

Q. The L. & N.'s part of that from Colesburg to Louisville how much?

A. \$34.08.

Q. How much per hundred?

A. 6 cents.

Q. What car was that brought to Louisville in, and what it cross the Ohio River in?

A. It was brought to Louisville in L. & N. car No. 96,712 went through, so far as we know,—that is, it went through minimal.

Q. In the same car?

A. In the same car.

Q. File that expense bill of the L. & N., please, sir.

The witness does so, and the expense bill is filed herewith exhibit No. 7.

Freight Bill.

Form 6910 X.

LOUISVILLE, Ky., Ninth Street and Broadway.

Louisville & Nashville Railroad Company to South Wanatah &
N. Y. C. St. L.

C. I. & L. Route. Date 12-14-12. Slip No. D 262. From Colesburg, Ky. W. B. 9. Date 12-11 1911. Car L. & N. 96,712. Consignee N. Y. C. & St. L. R. R. Co. Destination Thomaston, Ind. For A. W. Johnson, as per mem. Bill.

Consigner.	Marks.	Articles.	Weight.	Rate.	Freight and charges.
G. Fowler Bros.	Ties	O. R.	56,800	6	34.08
				5.7	
				5.3	

27-359-568.

Original Pt. Shipment.

Original Car.

2/15/12.

Exhibit No. 7.

Copy.

G. H. BOONE,
Official Stenog.

Q. Mr. Smith, I will ask you to examine the L. & N. tariff, and tell me what the regular tariff of the L. & N. lumber from Colesburg to Louisville is. I will first ask you to state at the 5th class rate is charged by the L. & N. from Colesburg to Louisville at the time of this shipment?

A. The 5th class rate from Colesburg to Louisville is 17 cents.

Q. What was the lumber rate from Colesburg to Louisville, according to the L. & N. tariff?

A. 6 cents per hundred; that is, not the 5th class. It is a special on lumber. The last one is 6 cents per hundred, and the first is 17 cents per hundred on ties.

Q. On which class did the L. & N. charge the 6 cent rate or the 17 cent rate?

A. The COURT: I sustain an objection to that.

Cross-examination by Mr. BRUCE for defendant:

Q. Mr. Smith, you read a while ago from a lumber tariff of the L. & N. What is the date of that lumber tariff?

A. I don't know, because I read only what was put before me.

Q. Just read what counsel showed you?

A. Yes.

Q. That hasn't got any date on it, has it?

A. Not that I can see, so far.

Q. The part that did have the date on it, probably has been torn off?

A. I don't know whether it has been torn off.

Q. I don't mean improperly. I mean, it isn't there?

A. In handling tariffs, they don't always stay together.

Q. I don't mean to suggest any impropriety. I don't mean to mean the page that showed the date is not on it now, so you tell what date it is?

A. I can't locate any date.

Q. I will ask you to look at the other tariff that you read to obtain the 5th class rate, and ask you to state the effective date of that tariff?

A. This is effective, interstate, April 20, 1913. Intra-state, course—

Q. That is the tariff that has applied since April 20, 1913?

A. Yes, sir.

Defendant moves the court to exclude the testimony of this witness on the subject of the 5th class rate, and also on the subject of the lumber rate, and the court sustains the motion.

316 Redirect examination by Mr. BASKIN for plaintiff:

Q. Mr. Smith, I will get you to examine this tariff, and tell me what was the 5th class rate on cross-ties from Colesburg, Ky., to Louisville, on December 11, 1912? (Handing paper to witness.)

A. This tariff is effective, interstate, December 31, 1909.

Mr. BRUCE: Do you know whether that was effective in 1909 or three years later?

The WITNESS: I do not. That is something I couldn't say.

Defendant objects to the use of the tariff, but the court overrules the objection, to which defendant excepts.

Q. Show what the rate on 5th class is from Colesburg to Louisville?

A. The rate on 5th class, from Colesburg, Ky., to Louisville, is 17 cents per hundred.

317 J. E. WRIGHT was the next witness called on behalf of plaintiff, and being first duly sworn testified as follows in response to questions by Mr. Norman:

Q. Where do you live, Mr. Wright?

A. At the present time at Caneyville, Grayson county.

Q. What is your business?

A. Local Manager for the Ohio Valley Tie Company.

Q. What division have you charge of?

A. What is known as the Green River territory. That is a division, I suppose you would call it.

Q. Does that include the O. & N. Division?

A. Yes, sir.

Q. How long have you been in charge of the Ohio Valley Tie Company's business in that territory?

A. Since September 1st, 1902; on the L. & N., I will change a little. The L. & N. part of it, since about 1907 or 1908, I will say.

Q. Did you, during the years of 1911 and 1912 have any difficulty in getting cars from the Louisville & Nashville Railroad Company in which to load ties belonging to the Ohio Valley Tie Company on the O. & N. Division? How many ties did you have on that division during that year? If you have a memorandum, made yourself, you may refer to that.

18 Mr. BRUCE: You speak of "year." Are you talking about your fiscal year now, or the solar year?

Mr. NORMAN: I am talking about from September 1, 1910, to September 1, 1911.

Q. What did you have on hand on that Division September 1, 1910?

A. In 1910—I had bought during the year, the fiscal year beginning September 1, 1910, to September 1, 1911, 80,000 crosses on the L. & N. Railroad. My invoice of September 1, 1911, shows the following ties on hand on the L. & N. Railroad: 55,221.

Q. How many did you buy during the year beginning September 1911?

A. 25,632.

Q. How many of those ties—some 80,000 I believe that adds up, have you shipped off the L. & N. Railroad?

A. 56,460.

Q. How many ties are remaining there?

A. 24,423.

Q. What is the condition of those ties that remained there?

A. Those ties are damaged by age.

Q. Why weren't they moved before they were damaged?

19 A. Well, we made efforts at several different times to move the ties. In fact, we did move all we could, but we had trouble getting cars.

Q. Did you make a requisition for cars during that period from me to time?

A. Yes, sir.

Q. Did you get the cars?

A. We got some on the requisitions, but not what we ordered, and not what we needed; we got a few cars.

Q. On whom did you make those requisitions?

A. The local agents at the stations.

Q. Were you allowed to load any empty cars that you could get those stations?

A. Well, up to November, 1911, they would let us load foreign cars, but after that date, they would let us load nothing but L. & N. cars proper.

Q. Were there any times when there were other cars there—cars other than the L. & N. cars,—that were available?

A. Yes, sir.

Q. Were there times when such cars were available when no L. & N. cars were available?

A. Yes, sir; there were.

Q. Can you give any specific instance in which you ordered cars

without receiving them or obtaining them? If you have
320 memorandum you may refer to it.

A. Yes, sir. (Referring to memorandum). This memo
was entered on my memorandum book at the time. I placed an
order October 8, 1911, with the agent at Belton, Ky., for 9 cars
load cars of ties. Five of the above cars were placed, which we
promptly loaded, and after waiting three days for the rest of the
orders, which we never received, in order to hold the Pennsylvania
Inspector, he was forced to leave and go to Princeton, Ky., so he

Q. Were you under any expense while you were waiting for
those cars?

A. Yes, sir.

Q. What expense?

A. I had the men there ready to load the cars and waiting to load
them.

Q. Did you have to pay their wages?

A. I paid their railroad fare there. I brought them down there
on two occasions and there were no cars.

Q. Did you pay their wages during the time?

A. No, sir.

Q. Are there any other instances that you made a memorandum
of at the time.

A. Yes, sir; I have some others here. Friday, February 9, 1912.

I placed an order with the Agent at Louisville for ten cars
321 to load ties at the rate of three cars per day. This order was
afterwards added to, and we began loading Tuesday, Febru-
ary 13th. Tuesday, February 13th, one car was placed and loaded.
Wednesday, February 14th, two cars were placed and loaded. Thurs-
day, February 15th, one car was placed and loaded, and Friday
February 16th, two cars were placed and loaded—

The COURT: You were not asked how many cars were placed and
loaded.

Q. What I mean is: Tell us how many cars were ordered and
how many cars you got? How many cars did you order per day?

A. Three cars per day.

Q. Did you get three cars per day?

A. No, sir; that is what I was illustrating there, showing that
some days we didn't get none.

Q. How many cars did you get all told on that order?

A. 23.

Q. How many did you need?

A. We could have loaded 75.

Q. Were you ordering that many from time to time?

A. We were ordering them at the rate of three cars per day and
fast as we could load—continuous loading.

Q. Well, Mr. Wright, did that condition exist with reference
to getting cars prior to the time that they issued the order
322 that you couldn't use anything but L. & N. cars?

A. Well, we have had some little trouble, sometimes we
knew, and sometimes we couldn't have any. Up to that time,

they didn't have care of their own, they would make an effort to get them and furnish us, and we were not bothered as much.

Cross-examination by Mr. Harbo, for defendant:

Q. I don't understand exactly about those orders from them. You say you gave an order October 8th, 1911, for some cars?

A. Yes, sir.

Q. And five were placed?

A. Yes, sir.

Q. And February 3, 1912, you gave an order for ten cars to be sent to Lewisburg?

A. Yes, sir.

Q. Then, you said something about a supplement to that order as I didn't catch. What was it about that?

A. I added to that order continually as we needed them for the use of those a day.

Q. For how long a time?

A. We could have used 15 cars at that rate on the road.

Q. I know, but when you gave your order for how long a time did you ask the railroad company for those cars a day?

A. I don't know as there was any specified time.

Q. And you got 15 cars on that order?

A. We got 15, yes, sir.

Q. How many did you have at Lewisburg at that time?

A. At Lewisburg?

A. Yes?

A. I would have to look at my records. I don't know. We looked at that we had at Lewisburg, but about four cars. We had four cars left at Lewisburg, but we had ten at other points on the road and we wished to look, which would have continued.

Q. But your order was given for Lewisburg?

A. Yes, sir, but we didn't finish the loading at Lewisburg. We were forced to leave.

Q. You looked about all the cars you had at Lewisburg, except not four cars of them?

A. Yes, sir.

Q. Which represents about a thousand cars, or how many cars does it represent?

A. About 1,000.

Q. How many cars did you load up on?

A. We loaded from 300 to 400, owing to the capacity of the cars and the size of the cars.

Q. What was the car you wanted on?

A. 7 x 8 x 12.

Q. What size up?

A. 10,000 capacity cars will carry 300 tons.

Q. You say you bought—I mean the Ohio Valley Gas Company right during the year, from September 1, 1910, to September 1, 1911, 10,000 tons?

A. Yes, sir.

Q. And how many cars did you ship out during that year?

A. I don't believe I have a record of that here. I have it, though, and could get it, but I haven't it with me.

Mr. Norman: You have a record of how many you had on hand September 1st, 1911?

The Witness: Yes, I have a record of how many I had on hand September 1, 1911.

Q. Did you have any on hand September 1st, 1910?

A. Yes, sir; probably a few; we hadn't done much business; not a great deal; only one or two points on the road prior to that time.

Q. The Ohio Valley Tin Company had been doing business on the L. & N. for two years prior to that time, hadn't they?

A. I had done some; yes, sir; but not a great deal.

Q. You don't know then how many tin you had on hand September 1, 1910?

A. I could look at my invoice and know it and tell, but I haven't it with me.

Q. I mean you don't know now, and can't tell us?

A. No, sir; I couldn't tell for sure.

Q. And how many tin you bought during the year from September 1, 1911, to September 1, 1912?

A. 55,221.

Q. Which you bought during that year?

A. I bought, from September 1, 1911, to April 20, 1912, I only bought 25,002 tin.

Q. That is from September 1, 1911, to April 20, 1912?

A. Yes, sir.

Q. Can you tell us—you bought them within that period 25,000 tin?

A. Yes, sir.

Q. Can you tell how many tin you bought within the year from September 1, 1911, to September 1, 1912?

A. I can't tell you right here. I haven't it.

220 W. H. Warren was the next witness called on behalf of the plaintiff, and being first duly sworn testified as follows, in response to questions by Mr. Norman:

Q. Mr. Smith, you are, and have been for many years, the President of the Louisville & Nashville Railroad Company?

A. Yes, sir.

Q. What instructions, if any, have you issued with reference to the general policy of the Louisville & Nashville Railroad Company as to purchasing tin—railroad tin—produced on its line, to be shipped off of its line?

Defendant objects, and the court sustains the objection.

Q. What rules or directions have you given with reference to that subject?

A. None at all, for many years at least. Many years ago—fifty years ago, I was General Freight Agent, and compiled the freight tariff for the railroad, and I assume at that time that rules were

published for the transportation of ties. I don't recall ever having issued any special instructions on the subject.

Q. Have you, Mr. Smith, in recent years, given any advice to your subordinates, the General Freight Agents, &c., on this subject?

A. I don't recall having given any; I am not sure that I have ever been consulted; at least, for some years.

Q. Mr. Smith, has the question of the right of the Louisville & Nashville Railroad Company to charge a higher rate on ties for the same movement than the rate contemporaneously charged on lumber been brought to your attention in the last few years?

A. In a general way that has in the last few years been instituted. I have known something of it. I think the tariffs that were established by me in 1899, a higher rate was then fixed for the transportation of ties than for the transportation of lumber, and that method of adjusting rates has been adhered to, so far as possible, since.

Q. What is the reason, and has been the reason, for charging a higher rate on cross ties than on lumber?

Defendant objects, but the court overrules the objection, to which the defendant excepts.

A. There is a very great mileage of railroad north of the Ohio River, built across prairie country, on which there is little or no material for cross ties. If all or some large part of them come down on our line to get their supply, they would soon strip us, and therefore it has been the policy, I think from the initiation of transportation of ties to connecting roads, to charge a reasonable rate for the transportation, which in most cases is higher than the rate on lumber. That may or may not be for the interest of the people who furnish the ties. If all of those roads, using millions of ties per annum, come onto our road and strip it at current prices, the people along the line wouldn't receive the benefit of the increased price of ties as the timber becomes scarcer from year to year. It may or may not be to the interest of the people to let the ties go out slower, and in future receive higher prices than they would if they went out at the current rate. In that way we have never believed that we were inflicting any injury upon the people along our line or patrons who furnished us ties, and have never had any very serious complaints until within the last three or four years, perhaps, when we have heard of some complaints from contractors who contract to deliver ties North of the Ohio River, but not especially from people who manufacture or furnish the ties, but from the contractors only.

Q. If I understand you correctly—

Defendant objects, and the court sustains the objection, to which the defendant excepts.

Q. Has it been your purpose, Mr. Smith, to prevent the movement of cross-ties off your lines?

A. That has been the effect and tendency, to keep the rate on ties as high as we could, to let them move out—if they moved at all—slowly.

Q. Have you been advised by your legal department in the last few years that you could not maintain any rate on cross ties higher than the rate contemporaneously charged on lumber?

Defendant objects, and counsel for plaintiff says he will withdraw the question.

Q. I will ask you if you did not know, during 1911 and 1912, when the L. & N. Railroad Company was maintaining and collecting rates on railroad cross ties higher than the rate contemporaneously enforced on lumber, that the Interstate Commerce Commission and the Kentucky Railroad Commission, had both, in cases in which your road was a party, held that no such higher rate could be justified?

Defendant objects.

Mr. NORMAN: I will withdraw the part about the Railroad Commission.

A. I think I must have learned in a general way that the Interstate Commerce Commission had issued such—or made such regulation.

Q. Now, Mr. Smith, do you know any traffic reasons why railroad cross-ties should bear a higher rate than lumber for the same haul at the same time?

Defendant objects, but the court overrules the objection, 330 to which the defendant excepts.

A. The traffic reason is—one of the important traffic reasons is, that it yields a larger revenue. The L. & N. gets more money for transporting ties per thousand feet, board measure, than it does for transporting lumber per thousand feet board measure, providing the rate on ties, per thousand feet, is greater than the rate on lumber.

Q. I am asking you why should they get more revenue out of that traffic than out of the lumber traffic?

A. For the simple reason that we charge a higher rate on different classes of property. Of course, we think the business can afford to pay the rate, and will yield us a larger revenue.

Q. Aren't railroad cross-ties of less value per 100 pounds and per foot than other forms of lumber, such as oak?

Defendant objects to this question, and all of this line of questions, on the ground that the question of what is a reasonable rate on interstate commerce is a matter solely to be determined by the Interstate Commerce Commission.

The Court overrules the objection. Defendant excepts to the ruling of the court.

A. I don't know. They may be of greater value. I 331 I think they should be. The cross-tie specifications of the Louisville & Nashville Railroad Company, if I am correctly advised, is made of young timber, round ties; that is timber from which a tie can be made with the edges round and the bases about 8 or 9 inches, and that may be more valuable than many kinds of

other lumber; in fact, the rates on lumber vary, as, I believe, we have one rate on oak lumber; another on walnut, possibly, and another on poplar. I think that is true, although I confess that I am not very well advised as to the rates on the L. & N. Railroad, as I haven't for many years given those matters personal attention.

Q. I am speaking, Mr. Smith, of the market value. Don't you know that the market value of ties is less per 1,000 feet, and has been for many years, than the market value of other kinds of lumber, such as Oak?

A. I don't know such to be the fact.

Q. Do you know whether oak, when made into ties, has less value in the market than when made into lumber?

A. I do not.

Q. Have you any knowledge on the subject, as to whether it is more or less?

A. I don't think I have. Ties are usually purchased by so much per tie, and oak lumber, I think, is usually purchased per 1,000 feet. I have never—I am not advised as to the value or
332 price per 1,000 feet, board measure, of white oak ties, according to specifications of the Louisville & Nashville Railroad Company, and the price of oak lumber per 1,000 feet.

Q. Mr. Smith, do you know of any reason why the Louisville & Nashville Railroad should charge a rate from two to four times as high for the same haul where that haul is a part of an interstate haul than where that haul is purely a state haul?

Defendant objects, but the court overrules the objection, to which the defendant excepts.

A. I don't know that such is the case.

Q. Assuming that is true, that from Smith's Grove, Ky., your rate on cross-ties, when destined to Louisville, is 8 cents per 100 pounds, and that when destined to points beyond Louisville your rate for your part of the haul up to Louisville is 32 cents per 100 pounds. Can you give any explanation for that fact, if it be a fact?

A. I cannot.

Defendant objects, as that is a matter purely for the Interstate Commerce Commission, but the court overrules the objection, to which the defendant excepts.

A. (cont'd). I do not, except it is done under some regulations
333 made by either the Interstate Commerce Commission or the State Commission.

Q. Has the Louisville & Nashville Railroad Company, during the past five years, been a member of the American Railway Association?

A. I do not know.

Q. Who would know that, Mr. Smith?

A. Why, the American Railway Association—probably the General Manager.

If the L. & N. Railroad Company is a member of the Association, there is some officer of the Company represents the Company in that Association. It may be the General Manager, or the Superin-

tendent of the Mechanical Department. I don't know. I have never represented the Louisville & Nashville Railroad Company in any such association.

Q. Isn't the Louisville & Nashville Railroad Company a party to some agreement, whereby they pay each other a per diem for their respective cars when they have them?

Defendant objects, and the court overrules the objection, to which the defendant excepts.

A. I don't know that there is any formal agreement. There may be. But since railroad companies commenced interchanging
334 railroad cars with each other, there has been an understanding or an arrangement, whereby they undertook to equalize by the payment of either a mileage basis, or a per diem basis, changed from time to time, the object being to facilitate through traffic. Originally the roads didn't permit their equipment to leave their own lines, and all freight was transferred from one car to another at the terminal points. When they commenced sending their cars through, their theory was that they would exchange loaded cars for empty cars, or car for car, and in order to overcome any excess of mileage, the cars furnished by one road to another, they agreed to pay, say, a half a cent, or three quarters of a cent per mile run. Of course, when the monthly accounts were rendered, if those accounts were about even, there was little or nothing to pay. If one road furnished more than another, of course, there was some compensation. That has been in effect since they commenced interchanging with each other, and it may be now, and I think it is, on a per diem basis. That is, instead of paying per miles run, if cars are handled not promptly, the owner of the cars get no compensation. They are charged by the day, 20 cents, or 25 cents or 30 cents per day as may be fixed from time to time, and I think some special arrangements are made between the various railroads. I was told by the Traffic Manager of the C. H. & D. Railroad the other day, that the Chesapeake & Ohio, in furnishing cars for transportation of coal from mines on those lines, to go on to
335 Toledo for the Lakes, where the rate is very low, they didn't pay per diem. They paid a certain rate per mile run. I think it was 400 miles, and I think he said they paid \$2.40. That would be .6 cents per ton per mile. Changes are made from time to time to meet the exigencies or conditions that may exist.

Q. Mr. Smith, you devised originally this plan of interchanging cars, did you not? Aren't you known as the father of the interchangeable car system?

A. No, I think not.

Q. What has been the custom of the Louisville & Nashville Railroad Company, with reference to allowing them to use L. & H. cars to distribute company material over other lines, when the L. & N. has delivered such cars to the other carriers, loaded with such material? I will give you a concrete instance of what I mean. If a car comes into Louisville, say, from Birmingham, loaded with steel and consigned to the Monon Railroad, wouldn't the L. & N.

deliver that car to the Monon, and allow the Monon Railroad to use that car under this per diem arrangement, to distribute that company material along its lines?

A. Why, I don't see any objection to that, especially as the Louisville & Nashville Railroad Company owns one half interest in the Monon. I don't think it would discriminate against it.

Q. Well, we will take the Big Four?

36 A. That is a matter of special arrangement. Each railroad retains the right to do with its equipment as its interest may require. No company allows its cars to leave its line except with its consent, and when, in the opinion of the management its interest will be promoted thereby. We are almost daily refusing to permit our cars—for instance, we don't dare now allow cars loaded with coal going from mines in Kentucky to points North of the Ohio River to any extent, for the reason that connecting lines will not furnish that class of cars to us in exchange. If we allowed our cars to leave our lines, we would soon be stripped of coal cars, and be compelled to close down the lines on our own road, and could not furnish transportation for coal to ship from the mines to points on the L. & N. We must retain such trade, and we do. Now, a condition arose, which will best illustrate it, of how these things have to be overcome at times: The Louisville & Nashville Railroad Company had constructed a very expensive line into the coal districts of Eastern Kentucky, and the only large market for the coal that is expected to be produced on that line is North of the River. Therefore, if we don't let our cars loaded with coal go North of the Ohio River, and the lines North of the River will not furnish us

37 cars, we have a road for which, practically no use can be made, and no mines can be operated successfully. Therefore, to meet that contingency, the Louisville & Nashville Railroad Company has contracted for 3000 coal cars, with the intention of putting them in that business, and letting them go north of the River. It is a matter for the management to decide. Herebefore we haven't done that. It all depends on the conditions. When congested conditions arise, and all roads are busy, especially north of the River, and on the L. & N. a large traffic is originated for points on other lines, much more tonnage goes over the lines on the L. & N. lines to points North of the River than comes from north of the River to points on the L. & N. Road. If we should allow indiscriminately our cars to go to points on connecting roads at a time when they are busy and have use for all of their own cars, and will not give us cars in exchange, car for car, we are soon stripped and can't do anything. Therefore, we embargo, and won't let our cars go off the line. They come up here with pig iron, and they won't furnish cars, and we throw the pig iron on the ground, and let it lay there until we can get a car from the connecting road. The iron is of a character, you know, that is not injured by exposure.

Q. Who pays the expense of that transfer, under those circumstances?

A. The L. & N., of course. We have to bear the expense of loading and unloading, but we had better do that than to have our business paralyzed by permitting our cars to go off line until we have enough to do local business with.

Q. Speaking of company material. Do you know of any instance where the L. & N. has refused to allow the connecting carrier to take the car in which the company material for that carrier is loaded and—

A. I don't know that I know of any specific instance. I would hesitate to do it. In fact, if we knew that to be the case, and that we wouldn't furnish the car, we would refuse to receive the property and give a bill of lading through for it.

Q. You require them to furnish—

A. They must furnish their quota of cars. They must give a car for car. The L. & N. can't furnish cars for the whole United States. Our mere matter of forty or fifty thousand cars would amount to anything if they were distributed all over the United States. We send a car North of the River, and we don't know where we are going to get it back; we may never see it again.

Q. If the Company who wanted their company material hauled offered to furnish you the cars in which to haul it, would you accept it for a haul in those cars?

A. I think so; yes. I don't see why we shouldn't.

Q. Mr. Smith, the Louisville & Nashville Railroad Company now owns what is known as the Lexington & Eastern? Doesn't it?

A. Yes, sir.

Q. And you built that extension in the mountains. That is one you were speaking of?

A. Yes, sir.

Q. How long have you owned the Lexington & Eastern?

A. Three or four years. I don't recollect the exact date.

Q. You also own, and have for several years owned a controlling interest in the Louisville, Henderson & St. Louis?

A. Yes, the L. & N. owns a majority of the capital stock.

Q. What interest, if any, does the L. & N. Railroad own in N. C. & St. L.?

A. The majority of the capital stock.

340 Cross-examination by Mr. BRUCE for the defendant:

Q. Mr. Smith, is or not the question of whether a railroad allows its own cars to go off of its own line of rails, a matter which every railroad company, including the Louisville & Nashville Railroad Company, keeps within its own control?

A. Absolutely so.

Q. Letting the cars go off its rails and keeping the cars on its rails, according as it believes the interests of the railroad company owning the car requires?

A. That is true.

Q. Counsel has asked you if you would use Pennsylvania Railroad cars into which to load material for the Pennsylvania Railroad Company?

to go to the Pennsylvania, and you said you saw no objection to it. Suppose you believed that a shipper was trying to use a Pennsylvania car for the purpose of making an interstate shipment, under the guise of a state shipment, so as to pay only the state rate, when the interstate rate was higher, would you use the Pennsylvania cars for that purpose?

Plaintiff objects, but the court overrules the objection, to which the plaintiff excepts.

341 A. I would not.

Q. Has the Louisville & Nashville Railroad Company in any way discriminated against the Ohio Valley Tie Company?

A. Not that I know of.

C. L. CROAM was the next witness called on behalf of the plaintiff, and being first duly sworn testified as follows, in response to questions by Mr. Norman:

Q. Where do you live, Mr. Croam?

A. Shepherdsville, Bullitt County, Kentucky.

Q. What is your business?

A. I am in the tie and lumber business?

Q. Do you ship ties from points on the L. & N. Railroad?

A. Yes, sir.

Q. Do you ship ties for the Ohio Valley Tie Company?

A. Yes, sir.

Q. Do you sell to the Ohio Valley Tie Company?

A. I sell to the Ohio Valley Tie Company some of my ties.

342 Q. Have you had any trouble—did you have any trouble in the year of 1911—the fall of 1911 and the year of 1912, in getting cars in which to load ties?

A. I did.

Q. Explain to the jury just what you did, and what happened?

A. Why, in getting ties for the Ohio Valley Tie Company, they would make you furnish an L. & N. car, even if the Pennsylvania car was standing empty on the side track and no orders for it, and they would inconvenience you in every possible way.

Q. Did you have any trouble in shipping to other people?

A. None at all; no special trouble at all.

Q. Would they require you to tell, before placing a car for you, to whom you were going to ship those ties?

A. They have in some instances; yes, sir.

Q. What did they require you to tell?

A. They required me to tell on one occasion that I remember—I have a memorandum made up that I made of it, about the 13th of October, 1911, at Bardstown Junction,—I made an order for some cars, and specified they were for Louisville delivery. He didn't get the cars for me, and I asked him why, and he said if they were for the Ohio Valley Tie Company—or about them words—that I couldn't get the cars. I said: "No, those ties are for the Street Railway Company." He said "Then I will get

them for you right away." That is from an exact memorandum that I made at the time, taken down.

Q. Did he get them for you right away?

A. Yes, sir; he got them for me right away. That trouble occurred in many instances.

Q. Did you ever come into Louisville to see any of the officials of the L. & N. about it?

A. Oh, yes; I have done that frequently; time and again.

Q. Who did you see?

A. Usually I went up and seen the Train Dispatcher, Mr. Morrison, more frequently than anyone else.

Q. What did he tell you about it?

A. He told me if I could use any foreign cars at that time, he could furnish them, and of course he could, because they were on the side track at Shepherdsville; that if he had been allowed to furnish foreign cars, he could furnish them, but the orders came for L. & N. cars at that time.

344 Cross-examination by Mr. BRUCE, for defendant:

Q. Do you know anything, Mr. Croam, about a controversy that arose in the summer of 1911, between the Ohio Valley Tie Company and the Louisville & Nashville Railroad Company in which the Louisville & Nashville Railroad Company claimed that the Ohio Valley Tie Company was trying to ship cars in interstate shipment really, but under the pretense of state shipments, for the purpose of evading the tariff?

A. The agent didn't tell me anything about that.

Q. So, you don't know anything about that?

A. I don't know the particulars of it, or just how it occurred, but I know they had trouble.

S. G. WILSON was the next witness called on behalf of the plaintiff and being first duly sworn testified as follows, in response to questions by Mr. Norman:

Q. Where do you live, Mr. Wilson?

A. Smith's Grove, Kentucky.

Q. What is your business?

A. Tie and lumber business.

345 Q. What is your connection with the Ohio Valley Company?

A. I sell them ties.

Q. How long have you been doing so?

A. Well, four years, I reckon.

Q. Did you have any conversation with Mr. Robert White, Roadmaster for the L. & N. Railroad Company?

A. Well, I did; or, rather, he had it with me. He heard us discussing the car question, we couldn't get cars, and I had a Pennsylvania Inspector there at that time, and I asked for cars to go to the Pennsylvania Railroad, and he said his company—I reckon he said they were going to put them out of business—going to put the Ohio Valley Tie Company out of business.

The defendant objects, and the court sustains the objection, and directs the jury not to consider the statement of this witness, Mr. Wilson, as to what Mr. White said about his company going to put the Ohio Valley Tie Company out of business.

Plaintiff excepts to the ruling of the court.

Q. Mr. Wilson, did Mr. White have anything to do with
346 buying for the L. & N.?

A. Well, I don't think he did, but he inspected the ties. He inspects all ties they buy on that First Division. He may for all I know, but I wouldn't state it.

Q. Mr. Wilson, did you have any trouble in getting cars in which to ship ties to the Ohio Valley Tie Company?

A. Yes, sir.

Q. In 1911 and 1912?

A. Yes, sir.

Q. What trouble did you have?

A. Well, I had various troubles. Sometimes I ordered the cars, and the agent would inform me that I would have to wait for L. & N. cars.

Q. Have to wait for what?

A. For L. & N. cars. He wouldn't give me cars when I was going to ship to the Pennsylvania Railroad, unless he furnished L. & N. cars.

Q. Did they allow you to load any ties into Pennsylvania cars?

A. I believe I loaded some to the Nickel Plate in Pennsylvania cars.

Q. What size ties were they?

A. They were 6 x 8.

Q. Does the L. & N. use that kind of tie?

347 A. No, sir; not on that Division.

Q. When did they begin the policy of not allowing you to load anything but L. & N. cars?

A. In 1911. I know, in October, 1911, I asked him for two cars at Smith's Grove, and two at Cave City and two at Oakland, and they said I had to wait for L. & N. cars.

Q. Before that, did you ever have to wait for cars?

A. No, sir; not very much.

Q. How long did you wait in this case?

A. We waited, I think, from four days to a week that time before we got the cars.

Q. How many men did you have to keep waiting until you loaded those ties?

A. Well, at Smith's Grove, I live there, and we generally get up the men after we get the cars. At both of the other places, we generally engage the men and tell them when we are going to load them, and have them on hand so they would be ready to get. We took them to Cave City on the train one trip that we made up there; we made two trips up there, and didn't get any cars, and I paid the way of seven men—six laborers and myself.

The COURT: Did you pay those men wages, or by the tie?

348 A. I paid them by the tie. But I had to pay them.
The COURT: You had to pay the expenses to and from the places?

The WITNESS: Yes, sir.

Cross-examination by Mr. BRUCE, for the defendant:

Q. Do you mean you were going to ship to the Ohio Valley Tie Company?

A. I was loading them for the Pennsylvania Railroad. I shipped the ties to the Ohio Valley Tie Company.

Q. When you say you paid the men, you mean you paid them don't you?

A. Yes, but I sent the Ohio Valley Tie Company a bill for it.

Q. When was that?

A. In October, 1911. I think it was about the 30th.

Q. How long have you been shipping over the L. & N.?

A. Pretty near as old as you are; about forty years.

349 Q. Did you ever have any trouble before as to delay in getting cars?

A. Yes, sir; I have over on the St. Louis Division; the same thing over there applying as to this. I used to live over there and shipped ties.

Q. The shippers are all the time having trouble about getting cars to ship in?

A. Especially the ties. I never have known when I have ordered a car for lumber. I am a lumber man too, and ship lumber. I have got some sold now to come up here.

Q. It takes a pretty good car to load ties in, doesn't it? It takes these gondola cars?

A. They never have given me no gondolas. You mean coal cars? A gondola is a coal car?

Q. A gondola. Isn't this true, Mr. Wilson: Between railroad companies and shippers there is more or less of conflict all the time about getting cars in time and delivering freight in time? There is a controversy and conflict going on nearly all the time?

A. Some conflict sometimes, especially when the L. & N. don't want to ship them off the L. & N., as they told me they didn't want to ship them off—

Defendant objects, and the court sustains the objection, and directs the jury not to consider the answer.

350 Q. You don't know when the controversy arose here in Louisville between the Ohio Valley Tie Company and the Louisville & Nashville Railroad Company, about whether the Ohio Valley Tie Company shipments were intra-state shipments or interstate shipments, and about the use of L. & N. cars in interstate shipments?

A. No. I sold the Ohio Valley Tie Company the ties, and they always wrote me and told me where to send them.

Q. Your communications were between you and the Ohio Valley Tie Company?

A. Yes, sir.

Redirect examination by Mr. NORMAN, for plaintiff:

Q. That bill you sent to the Ohio Valley Tie Company for the expenses of those men, did the Ohio Valley Tie Company reimburse you for that—pay your bill?

A. I told them to give me credit. I generally owe them some. I'm not a rich man, and they have to furnish me money.

Q. They advance you money?

A. Yes, sir.

Q. And credit your account with that?

A. Yes.

The COURT: Who lent that money for those men when you went down there, the six laborers and yourself, to load ties? Was it your loss or the Ohio Valley Tie Company's loss?

A. It was supposed to be the Ohio Valley Tie Company's; I sent them a bill for it.

Mr. BRUCE: How much did it amount to?

The WITNESS: The fare is 47 cents, I think; \$6.44 each way.

Q. \$13.73 for the two trips?

A. Yes; about that.

GOLDEN HARNED was the next witness called on behalf of the plaintiff, and being first duly sworn testified as follows, in response to questions by Mr. Norman:

Q. Where do you live, Mr. Harned?

A. Boston, Nelson county.

Q. What is your business?

A. Tie and lumber business.

Q. Do you sell to the Ohio Valley Tie Company?

A. I do.

Q. Did you sell to them during 1911 and 1912?

A. I did, the latter part of 1911 and 1912.

Q. Just explain to the jury just what that trouble was.

A. Well, up until about November, 1911, we could order the cars to get them in in about two or three days, and load any kind of a car, but after that they required us to use L. & N. cars. It sometimes would take a week or two weeks longer to get them.

Q. Did you have any trouble in getting cars in which to load lumber during that time?

A. Not very much. I have never known it to be over three days in getting a lumber car.

Q. What kind of cars did they let you load lumber in?

A. Any kind of car that is sitting on the side track.

Q. Did you ever come to Louisville and have any conversation—did you go to see any of the officials of the L. & N. here about the trouble you were having?

A. I did.

Q. Whom did you see?

A. E. D. Snider, the Superintendent of this Division.

Q. Did you explain to him the trouble you were having?

A. Yes, sir; this was the subject of the conversation. I ordered

those cars on November the 1st, and as the inspectors came to see them, I ordered them for the 12th; I gave them that 12th notice, and they were not placed, and the inspectors came on, and afterwards I came in and told Mr. Smith. I said: "In working a livery on me, or on my Company, unless we see the money, and we can't get the cars," and he said: "Why don't you sell them to somebody else?" He had talked to me previous to the about buying them. I offered to sell them to him, and he said: "I would have to sell them to Road Brothers, contractors at Glasgow, Ky."

Q. Who were they?

A. The men.

Q. For whom are they the contractors?

A. Well, now, I don't know of my own knowledge.

Q. Do you know to whom they delivered their cars?

A. Not of my own knowledge.

Q. Go ahead and tell what Mr. Smith said?

A. I told him. I said: "Well, that simply puts me out of the business, because they buy from the same people I do, we are on the pattern in the same territory, and it will simply throw me out of the business, because they wouldn't give me enough profit on it," and he said: "Well, have the Ohio Valley Traction Company then, take your time like we do, on the right of way." I said: "Well, that's a good suggestion, and I will not do that." So then I went to Mr. Smith and told him I would mention him to take the time I had with him on the right of way, and he did it, and paid me for it, but I thought.

Q. Did you afterwards ship those cars for the Ohio Valley Traction Company?

A. I think they were all shipped. There were about one hundred and some odd trailers, as we call them.

Q. Did you have any trouble in getting the cars?

A. Yes, sir; the same trouble. The agent notified me that the Ohio Valley Traction Company would have to move them, and I notified to get the cars, and we would move them.

Q. Did you have any trouble getting cars at Boston, Ky.?

A. Yes, sir; Johnsonville, Belmont and other points.

Q. Did any of the L. & N. agents ever tell you that they were here to know the destination of the cars?

A. The same man at Livingston told me that. I called him from the railroad's phone, and told him I wanted cars for Louisville delivered to the Pennsylvania, and he said to what point in the Pennsylvania are those cars going, and I told him that I didn't know. He said he would have to know what the destination of the cars was, before he would place the cars.

Q. Did they ask you whether those cars were the Ohio Valley Traction Company's cars?

A. No, they didn't ask me, but I told them in a conversation that they were.

Q. How does your heart any time when you have ordered cars

otherwise, and the agent had agreed to furnish them, that they were not furnished, and you had seen them ready to sell?

A. From and again. That is what I called in Mr. Butler about. I told him that up to that time I had never got in any bill to him, but I told my the ladies by the the, whether I got a bill or not. It cost me a dollar and a half a week for three days in this one case, and I had to pay three whether they would not or not.

Q. What about keeping them waiting?

A. The time I speak of, November 14th, I had no intention that he had, and the more for two days at that time. I was not any more exposed—about \$100 or \$125, at one time.

Q. Did I understand you to say that was your own exposure?

A. Yes, sir, the company offered to pay it, but I never promised.

Q. What company?

A. The Ohio Valley The Company. They told me to present it, but I never did, because the agent had promised me that the deal would get there that day or the next. He told me to bring my own car. That is what I went to see the Butler about.

Q. Recommended by Mr. Butler to the defendant?

A. That agent in Liverpool—

Q. He wasn't the agent. He was what we call the up man. Is he the other Mr. Lawrence. He is the man. I don't know the man I was talking to when I called up.

Q. He was some the car man of the 1, 2 & 3?

A. Yes, sir, the car man.

Q. The question he asked you was where on the Pennsylvania system were these cars going?

A. I told him I didn't know. They were killed by through cars, Louisville delivery, and he said "I will have to have other information they want to."

Q. Don't you know the name he wanted to know that was to sell whether it was an automatic shipment, or an automatic shipment, but was contemplated?

A. I didn't know that that was the name.

Q. I & Q. They was the man whom called up behalf of the plaintiff, and being they had never reached in before, he wanted to question to Mr. Lawrence.

A. When he was the Mr. Butler?

A. That was the name.

Q. What is your name?

A. I am one of the best managers for the Ohio Valley The Company. I am in the in business in Kansas, Kentucky.

Q. How long have you been Manager for the Ohio Valley The Company?

A. Two years last September.

Q. Where is your big car lot?

A. In Cincinnati.

Q. In any of your shipments were in Liverpool?

A. Very seldom, if any.

Q. Why is that?

A. Well, it is more direct to Cincinnati. Cincinnati and Louisville are equal points of delivery, so far as we are concerned.

Q. Have you ever had any trouble in getting cars, etc., to go to Cincinnati?

A. Very little.

358 Q. What trouble, if any, have you had with reference to a hoist, which you wanted to install up there? First, explain what is a hoist?

A. A hoist is a conveyor, which we have on streams. Ties are floated down and put on it, and it runs it up on the siding. It runs it up so they can load on cars. It is an endless chain affair.

Q. Did you attempt to locate a hoist on the L. & N. Railroad, for the Ohio Valley Tie Company?

A. Yes, sir.

Defendant objects, but the court overrules the objection, to which the defendant excepts.

Q. With whom did you make arrangements for the erection of this hoist, and just explain to the jury the facts of the conflict over the transaction?

A. I made an arrangement—my talk was with J. E. Willoughby, the Chief Engineer.

Q. Of what?

A. The L. & N. Railroad Company.

Q. What arrangements did you make?

A. I had a verbal understanding with him. We were to
359 build this hoist there at a certain point about eight miles above Hazard, on the Kentucky River, and we were to sell them some ties for the construction of the line, and we were to have the track in there when they were through, and ready to do a general tie business, and in compliance with that request, and that talk with him, he had Mr. Justice, who is, I believe they call it, Division Engineer. He is the next man under him in charge of the work. He called him and asked him to have the resident engineer to go and lay out the track as I wanted it, and to report to him. He said to me: "When I get that, we will fix you up a track." Then, according to the arrangement with Mr. Justice, I met him at the point on a certain date, and he had his engineer come and lay out the track as we wanted it. However, he didn't get done with the work until I left. So, a little later, a few days later—I got a copy of a letter from this resident engineer, addressed to Mr. Willoughby, stating what he had done.

The COURT: Where is that letter?

The WITNESS: In my pocket.

Q. Read the letter?

Defendant objects, but the court overrules the objection, to which the defendant excepts.

The COURT: Who is the letter from?

The WITNESS: E. M. Denham.

The COURT: Who is Mr. Denham?

The WITNESS: He signs his name as Engineer.

The COURT: Who is this letter addressed to?

The WITNESS: Mr. J. E. Willoughby.

The COURT: Who gave you that letter?

The WITNESS: I got it from the mail, from Mr. Denham.

The COURT: Was Mr. Denham the resident engineer of the
L. & N.?

The WITNESS: Yes, sir.

Mr. BRUCE: That is on the Lexington & Eastern?

The WITNESS: Not on the main line; on the extension.

Mr. BRUCE: Isn't that letter written on the Lexington & Eastern
letterhead?

The WITNESS: Yes, sir.

The Witness reads the letter as follows:

"Office of Resident Engineer.

JEFF, KY., Nov. 28th, 1911.

Mr. J. E. Willoughby, Chief Eng'r Cons., Louisville, Ky.

DEAR SIR: I am sending you plan and profile of proposed
siding near Jeff, Ky. for the Ohio Valley Tie Co.

Mr. Justice was here with Mr. Ford to look over the
ground. Mr. Ford wants 160 feet of straight track on level grade
on each side of hoist as shown on plan. I allowed 12 feet between
and ties for hoist. He located straight track and I ran curve to con-
nect with main line.

If plan & profile meet with your approval please send me a blue
print of each. Also send copy to J. W. Ford, Jackson, Ky.

Yours truly,

E. M. DENHAM,
Res. Eng'r.

Copy to W. S. Morton.
J. W. Ford."

Said letter is filed herewith as Exhibit No. 8.

Q. What was done after that?

A. About this time I got a letter from Mr. Willoughby.

The COURT: Where is that?

The WITNESS: I have it in my hand.

The COURT: Is it about that matter?

The WITNESS: Yes, sir.

The COURT: Go ahead and read it.

The witness reads the letter as follows:

"BURKESVILLE, KY., Nov. 22, 1911.

Ohio Valley Tie Co., Jackson, Ky.

GENTLEMEN: Referring to your request to have a side track con-
structed at Jeff, in connection with a tie hoist, which you are pro-

posing to construct at that place, it will be a long time before the railroad is constructed as far up the river as Jeff. I do not consider that I have authority to arrange for the construction of a side track as requested, and I would suggest to you that it would be prudent not to make any expenditure in the way of constructing a tie hoist or arranging to take ties out of the river at that point.

Yours truly,

J. E. WILLOUGHBY."

363 Said letter is filed herewith as Exhibit No. 9.

Q. Had you made any expenditure prior to the receipt of the letter on the faith of your talk with Mr. Willoughby?

A. At the place the other engineer was going over with Mr. Justice and myself to locate this hoist as laid out, I contracted for the ground to erect this hoist on a side-track which would be there.

Q. For what length of time?

A. Five years.

Q. What rental?

A. \$155 a year annual rental.

Q. Had you accumulated any ties there?

A. Yes, sir; we had some ties at that time.

Q. Do you know how many?

A. About 30,000.

Q. What did you do with them?

A. We sold them to the L. & N.—I mean to the road, the L. & N. or L. & E. It seemed that part of the business was done as the L. & E., but the L. & N. was doing it.

Q. This was an extension built by the L. & N.?

364 A. Yes, sir; this was built by the L. & N.

Q. Did you sell them any ties before they refused to let you build the hoist?

A. We had some contracted for at that time.

Q. At what price?

A. 51 cents.

Q. What did you sell those ties to them for after they wouldn't let you build a hoist?

A. 45 cents.

Q. Why did you sell them to the L. & N. for 45 cents?

A. Because we had no other disposition to make of them. We had them there, and we sold them at 45 cents. This 45 cents has been in this year.

Q. Was there any other way to get those ties out?

A. I didn't know of any, to make it profitable.

Q. Did you go to see Mr. Willoughby?

A. Yes, sir.

Q. When you got that letter from him?

A. Yes, sir.

Q. What conversation did you have with him?

365 A. When I got Mr. Willoughby's letter, it was so different from his talk, that I didn't understand his position. I came to Louisville and went to see him down on Broadway, and told him that in our various talks, in one part, he had encouraged

business, and now his letter seemed to much discourage it. Well, after talking some little bit, he said: "Well, I will tell you what the trouble is. I took the matter up with my superior officers, and they said they didn't want me to encourage the tie business on their lines, and he didn't want to have anything more to do with it. He said, I could advise you to have nothing more to do with it."

Q. Did the L. & N. build this road past this point?

A. Yes, sir.

Q. How long afterwards?

A. Well, something like—they were building it at the time, of course, doing the work along there, and they got it in running order, I will say, within about one year.

Q. Did they put any switches in for you after they got it completed?

A. No, sir.

Q. Did they do so for anybody else?

A. Not there.

Q. Along the road, I mean?

A. Oh, some other switches have been put in.

3 Cross-examination by Mr. BRUCE for the defendant:

Q. Mr. Ford, the first letter which you read here, being a letter from E. M. Denham, stating the general nature of the construction that was wanted, was November 20, 1911, wasn't it?

A. Yes, sir.

Q. The second letter you read, being the letter from Willoughby, saying he couldn't permit that construction, was written more than a week, or just about a week, prior to Denham's letter, wasn't it?

A. Yes, sir; the 22nd.

Q. In other words, Willoughby's letter to you, telling you that the hoist could not be made, was written a week before the letter of Denham's describing the details of the same?

A. Yes, sir.

Q. As I understand from Mr. Willoughby's letter of November 22nd, the railroad that you were talking about making a connection with, wasn't even completed at that time?

A. No, sir.

Q. When was that railroad constructed to the point where you wanted this connection?

7 A. Well, it was in the course of construction at the time, of course. The track was laid along there by that point, early in 1912, as I remember.

Q. In other words, there wasn't any track laid past that point until some months anyhow after the date of this correspondence?

A. Certainly not.

Q. The road wasn't, in fact, open for traffic, until what time?

A. I think about November of last year.

Q. In other words, the road wasn't open for traffic until about a year after this correspondence that you have introduced here?

A. Something like that.

Q. So that even if you had your switch connection in, you

couldn't have had your cross-ties hauled over that road for over a year after this correspondence?

A. I could not.

Q. And your ties that you say you had gathered there at the time of this correspondence would have had to lie out there for a year awaiting shipments?

A. No, I beg your pardon, Mr. Bruce. The ties, it was understood we were to sell them to the L. & N., and we did sell them practically 100,000 ties at various points along the line.

368 Q. In other words, your market for ties at the time of this correspondence was with the L. & N. Railroad Company?

A. Yes, sir.

Q. And nobody else?

A. Yes, sir.

Q. And you sold them to the Louisville & Nashville Railroad Company?

A. Yes, sir.

Q. Explain to me this construction which you wanted. I don't understand it. What kind of construction of tracks did you want there in connection with that hoist?

A. We wanted a side track, or a spur, you might call it, turning off of the main line, and come out over here to the right of way with the end pointing out towards the river, and that made the switches down there to go on either side of the hoist.

Q. What distance would those tracks that you wanted to have there run on the right of way of the Louisville & Nashville Railroad Company?

A. They would run across the right of way. I suppose maybe the right of way at that point would be maybe 100 feet, and it would be practically half of it on that side of the road; 30 or 35 feet—30 or 35 feet.

369 Q. Did you want two tracks running on the right of way?

A. One on the right of way.

Q. You had, of course, to make connection with the main line of the L. & N. Railroad by a curve?

A. A slight curve.

Q. A slight curve?

A. A slight curve.

Q. Then, it must have run for some little distance on the right of way, if there was a curve on the right of way?

A. I don't understand your idea when you say right of way. I mean the right of way is probably 30 feet wide, and it ran a short distance before it commenced—I don't know the distance; the engineer laid it off, and he said it was practicable.

Q. You don't know the distance that it would take from the railroad side-track that you wanted on the right of way, to the point where it connected with the rails of the railroad company?

A. No, sir; I don't know the distance of that.

An adjournment was here taken until 2:15 o'clock P. M.

370 HOWARD ANDREWS was the next witness called for plaintiff, and being first duly sworn, testified as follows, in response to questions by Mr. Baskin:

Q. Where do you reside, Mr. Andrews?

A. Nashville.

Q. Nashville, Tennessee?

A. Yes, sir.

Q. What is your business?

A. Railroad ties—Nashville Tie Company.

Q. Dealing in railroad ties, in connection with the Nashville Tie Company?

A. Yes, sir.

Q. Did you, or your company, ever ship a carload of ties that passed through Louisville, over the L. & N. Railroad, going into Indiana, on which the question of the rate of freight was involved—where a controversy arose about the freight-rate?

A. Yes, sir; we had several cars shipped from points in Kentucky—Stovall to Louisville and Bloomington.

Q. Bloomington, where?

A. Bloomington, Indiana. The last car was shipped to Louisville, and turned over to the Monon here. The ties were to be used in Bloomington, and were forwarded there; and they assessed the high rate of 35 cents a 100, I think it was, where the lumber rate was 9.

371 Q. What did you do about that?

A. In that case we filed a claim. We had some correspondence regarding it.

Mr. BRUCE: Don't speak of the correspondence, unless you produce it.

Q. What was the result?

A. They turned the claim down, and refused to pay us at first. Then, later, I took it up with them again, and they paid it.

Q. Paid you the difference between the rates?

A. The difference between the 9 cents per hundredweight, and the 35 cents.

Q. Without a law suit?

A. Yes, sir; in this particular case. We had some other case before, but—

Q. Don't tell about the other case. Do you know Mr. Starks, the General Manager of the L. & N. Railroad Company?

A. Yes, sir; I do.

Q. Did you have a conversation with him in regard to establishing a tie-plant on the line of the L. & N. Railroad, and if so, just tell what the conversation was?

A. I think it was in June, 1911.

Defendant objects, as irrelevant—as to the establishment of a tie-plant on the L. & N. Railroad. The court overrules the objection, for the time being, until the nature of the conversation is disclosed, as to whether it showed some purpose or proposed action by the Railroad Company with reference to the rates

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Q. State what that conversation was with the General Manager

A. The conversation wound up in this way: We were wanting to do some business with the L. & N. Railroad Company where we would furnish them ties, what they wanted, and the rest would be treated. In this case we wanted to ship some ties off the L. & N. Road. Mr. Starks made the remark that the policy of their road—

Defendant objects, but the court overrules the objection, and defendant excepts.

Q. Go ahead, Mr. Andrews?

A. He said that the policy of their road was not to allow ties to be shipped off of it; that they needed the ties themselves. I told him at the time that that would be impossible; that ties would be moved off of the road. He made the remark that they would make it as high as they could for shippers who shipped off the line, for them to go over it—which they did with us.

373 Cross-examination by Mr. BRUCE for the defendant:

Q. What was this transaction—was it the Nashville Tie Company?

A. Yes, sir.

Q. Were you an officer of that company?

A. Yes, sir. At that time I was Treasurer.

Q. When was this transaction to which you have referred?

A. It was about June, 1911; about that time, I am not positive as to the exact date.

Q. Have you the correspondence to which you have referred?

A. I think the attorneys there have a copy of it. They asked me for it, and I furnished it to them.

Q. I would like to see it.

A. There was one letter, the last letter in the correspondence, I couldn't find—that the claim had been allowed and they would pay it; but they did pay it.

Counsel for plaintiff furnishes Mr. Bruce a batch of correspondence, which he in turn submits to the witness, who examines it before answering.

The WITNESS: It is not all here. There is a little more of it.

374 Mr. Norman, of counsel for the plaintiff, hands some additional correspondence to Mr. Bruce, with the statement "That is all we have."

After examination, the witness answers:

The WITNESS: I think that is complete, with the exception of one letter.

Q. You say, Mr. Andrews, that you can't find the letter allowing that claim?

A. I can't find the letter stating that they would allow it. The claim was paid on November 13, 1912, without any further trouble. I had a letter stating that they would pay it; but I mislaid that letter somewhere, saying they would pay it. It was with the correspondence somewhere.

By a letter of February 28, 1912, your company, the Nashville Tie Company, was informed that the claim would not be paid, the claim was returned; is not that true?

Yes, sir; and then a little later, on June 13, 1912—this letter, I read it?

Yes.

Q. I understand, then, from that letter, that your company insisted that that was an intra-state shipment, governed by the rules of the Kentucky Railroad Commission?

Yes, sir.

And you were saying that if it was not paid you would take it before the Kentucky Railroad Commission?

Yes, sir.

Was that allowed and paid on the ground that the shipment was an intra-state shipment?

I don't know what their ground was for paying it. In reply to the letter they stated that the claim was allowed, and voucher was issued.

You don't know on what ground?

No, sir.

Redirect examination by Mr. BASKIN for plaintiff:

Was that car that Mr. Bruce just asked you about consigned to anyone in Louisville?

It was consigned to the Nashville Tie Company, ourselves, at Louisville.

And they re-billed it out to Bloomington?

Yes, sir; and it was re-billed at our request.

Recross-examination by Mr. BRUCE for the defendant.

Have you got that billing with you, Mr. Andrews:

I don't think I have the bill of lading. It is there, if it is. I am confident it was billed to ourselves, at Louisville.

When was it billed to Indiana?

Upon arrival here, or a day or so afterwards.

You don't remember just when it was billed to Indiana?

No, I can't recollect just the time—At the time the car was loaded from Stovall, and the report came to our office—a letter was sent back; and we forwarded it to Bloomington.

How is that? I don't quite catch that?

As soon as a report came to our office giving the number of the car that was loaded and shipped here, we asked Louisville to forward it to Bloomington, Indiana.

Asked "Louisville?" What do you mean by "asked Louisville?"

Well, the L. & N. Railroad at Louisville—Or the K. & I. Bridge Company, I should say, the K. & I. Bridge Company.

And that car, when it arrived at Louisville, was delivered to the K. & I. Bridge Company?

A. I presume so.

377 Q. And subsequently you instructed the K. & I. Bridge Company to bill it out to Indiana?

A. Yes, sir.

Q. You don't know on what ground that alleged excess freight claim was finally allowed?

A. No, sir; I do not.

Plaintiff rests.

Motion for Peremptory Instruction.

At the close of plaintiff's testimony, defendant moves the court to peremptorily instruct the jury to find a verdict for defendant.

Motions to Exclude Testimony.

1. Defendant moves the court to exclude and withdraw from the consideration of the jury all testimony of the witness C. P. Bush to the effect that on interstate shipments of cross-ties the L. & N. Railroad Company charged to and collected from the Ohio Valley Tie Company the rate fixed in its interstate tariff on 5th class freight; and all testimony to the effect that the rates thus charged and collected were higher than the rates charged on interstate shipments of lumber; and all testimony to the effect that the rates thus charged and collected on cross-ties were unreasonable, high or unjust; because, under the Interstate Commerce Law of the United States, the Interstate Commerce Commission alone has the power to determine whether or not a rate charged and collected is unreasonable, and the right to determine what damage, if any, has been caused to a shipper by the charging of an unreasonable rate, and the fixing of the amount to be paid by the railroad company to a shipper as damages on account of the charging of such unreasonable rate; and this court has no jurisdiction to consider or determine the amount of damages that shall be charged to a shipper on account of the fact that a railroad company has charged to him and collected from him an unreasonable rate for the carriage of goods in interstate commerce; and in support of this motion, the defendant relies on the Act of Congress of the United States, ordinarily known as "An Act to Regulate Commerce," approved February 4, 1887, and the various amendments thereto.

2. Defendant moves the court to exclude and withdraw from the consideration of the jury and all testimony offered in this case to the effect that the L. & N. Railroad Company charged to the Ohio Valley Tie Company 5th class rate on cross-ties moving in interstate commerce; and any and all testimony to the effect that such rates thus charged were too high, or unreasonable or unjust for any reason; and all testimony as to any damage done to the Ohio Valley Tie Company by reason of such charges; because under the Interstate Commerce Law of the United States, to-wit: T

entitled "An Act to Regulate Commerce," passed by the Congress of the United States, and approved February 4, 1887, and the various amendments thereto, the sole right and jurisdiction to determine the question of the reasonableness or unreasonableness of a charge on interstate freight, and to determine also the question of the amount of damage done to a shipper by reason of the charge of an unreasonable rate, is vested in the Interstate Commerce Commission, and this court has no power to determine such questions.

The defendant also moves the court to exclude and withdraw from the consideration of the jury all testimony relating to the charge and collection by defendant from plaintiff, the Ohio Valley Tie Company, of what plaintiff claims were excessive rates on eighty-five carloads of ties, which were the subject of the action of the Ohio Valley Tie Company against the Louisville & Nashville Railroad Company, in which judgment was given by the Jefferson Circuit Court for the alleged excessive charges, and which judgment was appealed from to the Court of Appeals of Kentucky, and is now pending, as is shown by the testimony, in the Supreme Court of the United States, on writ of error to the Court of Appeals of Kentucky; because, it is shown of record, and by the evidence introduced in this action, that said shipments were properly interstate shipments, and therefore governed by the Act of Congress Regulating Commerce, approved February 4, 1887, and the various amendments thereto; and hence the action of the Railroad Company in charging and collecting the rates they did charge and collect on said shipments was not illegal, but was legal, there having never been any application by the Ohio Valley Tie Company to the Interstate Commerce Commission for a correction of the rates there charged and collected, or for reparation on that account.

The court overrules defendant's motion for peremptory instructions, and defendant excepts to the ruling of the court. On adjournment was here taken until 10 o'clock tomorrow morning.

Resumed at 10 o'clock Wednesday morning, April 22, 1913, as adjournment.

Plaintiff moves the court to be permitted to read in evidence the answer of the defendant, but the court overrules the motion, to which plaintiff excepts.

Defendant's Witnesses.

H. DULANEY was the first witness called on behalf of the defendant, and being first duly sworn testified as follows, in response to questions by Mr. Bruce:

Q. This is Mr. Dulaney?

A. Yes, sir.

What are your initials?

A. E. H. Dulaney.

Q. You are connected with the Louisville & Nashville Railroad Company?

A. Yes, sir.

Q. In what capacity?

A. Assistant to the Third Vice President.

Q. He is the Chief Traffic officer, I believe, of the railroad, is he?

A. Yes, sir.

Q. Mr. Dulaney, have you with you the tariffs of the Louisville & Nashville Railroad Company in interstate shipments, such as have been filed with the Interstate Commerce Commission, running back say to the year 1902?

A. Yes, sir.

Q. I wish you would begin with the year 1902, which was the year before the Ohio Valley Tie Company was organized as a corporation, and give us tariff by tariff the different tariffs of the Louisville & Nashville Railroad Company that have been filed with the Interstate Commerce Commission, beginning with the year 1902 down to the present time, and the effective date of each tariff.

383 Then I want to ask you certain questions about them, beginning with 1902?

A. I assume your question relates to the classification?

Q. Yes, sir.

A. And the issues showing the classification on cross-ties?

Q. Yes. Have you the local classification of the Louisville & Nashville Railroad Company that was effective in 1902?

A. Yes, sir.

Q. What date did the tariff which you now have in your hand become effective?

A. March 19, 1902.

Q. According to that tariff what rate of freight did cross-ties interstate commerce carry?

A. The 5th class rating on wooden cross-ties, carloads; that was shown in the Louisville & Nashville Railroad Company's Local Classification No. 19, I. C. C. No. A-5078, effective March 19, 1902.

Q. You read an I. C. C. number. What do you mean by that?

A. That is the number of the issue under which it is filed with the Interstate Commerce Commission.

Q. I. C. C. means Interstate Commerce Commission?

A. Yes, sir.

384 Q. When was the next tariff of the Louisville & Nashville Railroad Company issued and filed with the Interstate Commerce Commission?

A. Classification No. 20, I. C. C. No. A-5845, effective March 19, 1903, cancelled Classification No. 19, I. C. C. No. A-5078.

Q. Under that Classification No. 20, at what rate, of what rate of freight, did cross-ties in interstate commerce carry?

A. Wooden cross-ties, carloads, 5th class, applicable on interstate traffic.

Q. Well, when was the next tariff issued and filed with the Interstate Commerce Commission?

the Commerce Commission by the Louisville & Nashville Railroad Company?

A. Louisville & Nashville Railroad Company's Local Classification No. 21, I. C. C. No. A-5477, cancelling—

Mr. BRUCE: You need not read the cancellation. State when it became effective.

A. February 11, 1904.

Q. When did the next tariff take effect?

A. Classification No. 22, I. C. C. No. A-7174, became effective January 20, 1905.

Q. Under that tariff, what rate of freight did cross-ties in interstate commerce carry?

A. Wooden cross-ties, 5th class.

Q. When was the next classification issue, and when did it become effective?

A. The Classification of the L. & N., Local Classification No. 22, I. C. C. No. A-7174, was cancelled, effective May 1st, 1908, by what term an amendment to same, and reference made to Southern Classification No. 35, I. C. C. No. 10, effective the same date.

Q. May 1, 1908?

A. Yes, sir.

Q. What you have been reading heretofore, you called L. & N. classifications?

A. Yes, sir.

Q. Now, you speak of this being superseded by Southern Classification?

A. Yes, sir.

Q. Explain what that is?

A. The L. & N. Local Classification was an issue which applied only to traffic on stations on the Louisville & Nashville Railroad, and was issued in order that we might provide by a classification for a number of items which were not taken care of in the Southern Classification. Effective May 1, 1908, we issued in Southern Classification, our Note, 28 exceptions, which carried all the items previously carried in the Local Classifications.

Q. Prior to this time, in May, 1908, and during the previous years you have mentioned, was the Louisville & Nashville Railroad Company's railroad tariff governed by the Southern Classification except there were certain additions to it, local to the L. & N.?

A. Yes, sir; that was, in effect, the case.

Q. Then, on May 1, 1908, when you say you issued the Southern Classification, what was the nature of the publication then issued which you call the Southern Classification No. 35?

A. It was in effect practically the same as we had carried all along, only it was issued in a different form. We put in one publication what we had prior to that time carried in two publications.

Q. Under this Southern Classification No. 35, effective May 1, 1908, what rate of freight did cross-ties in interstate commerce carry?

A. 5th class, wooden cross-ties carloads.

Q. By the way, did you give the Interstate Commerce Commission number of that Southern Classification No. 35?

A. Yes, sir; I. C. C. No. 10.

Q. State whether or not the L. & N. Exceptions to which you have referred as embraced in that Southern Classification were printed in the same volume that contained the general classification?

387 A. Yes, sir.

Q. And state whether or not any shipper who had the general classification would have the exceptions also?

A. Yes, sir; furthermore, all of the tariffs made reference to the classification and to the exceptions.

Q. When was the next tariff issued?

A. Southern Classification No. 36, I. C. C. No. 11, effective March 20, 1909.

Q. What rate of freight by that classification, did cross-ties in interstate commerce carry?

A. 5th class, wooden cross-ties, carloads.

Q. When was the next tariff issued, and what was the number of it?

A. The next issue was Southern Classification No. 37, I. C. C. No. 13, effective October 20, 1909.

Q. Under that tariff, what rate of freight did cross-ties in interstate commerce, carry?

A. Wooden cross-ties, carloads, 5th class.

Q. When was the next tariff?

A. The next tariff issued was Southern Classification No. 38, I. C. C. No. 15, effective August 1, 1910.

Q. What rate of freight did cross-ties in interstate commerce carry under that tariff?

A. Wooden cross-ties, carloads, 5th class.

388 Q. When was the next tariff?

A. The next tariff issued was Southern Classification No. 39, I. C. C. No. 17, effective June 17, 1912. The effective date of Southern Classification No. 39, I. C. C. No. 17, was postponed from June 17, 1912, until August 1, 1912, and then until October 1, 1912, and then November 1, 1912. There were a number of other postponements. Do you want me to read them all into the record?

Q. No. When did it actually become effective?

A. November 1st, 1912.

Q. What rate did cross-ties in Interstate commerce carry under that tariff?

A. Wooden cross-ties, carloads, 5th class.

Q. What is the next tariff?

A. That is the issue at present in effect.

Q. Is there or is not there one effective February 18, 1913? Have you got that one with you?

A. That classification in effect—the last supplement having been issued to become effective April 1, 1913. I know of no issue of February 1, 1913.

The Court: What was the classification for cross-ties in interstate commerce?

The WITNESS: 5th class; no change was made.

389 Q. Was there a tariff issued February 18, effective, I mean, February 18th, 1913, referring to cross-ties?

A. This was a commodity tariff. I was giving you the classification rating which governed during all of those periods.

Q. What is this commodity tariff you now have before you, effective February 18th?

A. L. & N. Railroad Tariff No. G. F. P. No. 1966, I. C. C. No. A-12693, effective February 18, 1913, and showing rates on cross and switch-ties, wooden, from various stations on the L. & N., to the Ohio River crossings, and other points.

The COURT: That is the same rate, 5th class?

The WITNESS: No, sir; these are specific commodity rates, lower than the 5th class.

The COURT: What was the rate for cross-ties in interstate commerce?

The WITNESS: Varying rates from different points. If there is any specific point, I can tell you.

Q. Mr. Dulaney, were those various different tariffs which you have mentioned here filed with the Interstate Commerce Commission at Washington?

390 A. Yes, sir.

Q. Mr. Dulaney, some reference was made yesterday to a shipment of cross ties for the Nashville Tie Company, originating at Stovall, and which came to Louisville, and then went on to Bloomington, Indiana, the statement being made that the 5th class rate was first charged on that shipment, and then a refund demanded by the shipper. That the refund was at first refused, but was afterwards allowed and paid. State under what conditions that refund was allowed and paid, and why it was allowed and paid?

A. A formal complaint was filed before the Interstate Commerce Commission by the Nashville Tie Company, and the hearing of that complaint was had at Nashville in April, 1912, following which the Commission issued an order, their unreported opinion No. 629, and decided June 6, 1912, under which the Louisville & Nashville Railroad Company was required to establish a rate of 9 cents per 100 pounds and award reparation to the Nashville Tie Company to the basis of that figure. The refund was paid.

Q. Was the refund of that charge a matter voluntarily done by the Louisville & Nashville Railroad Company for the purpose of favoring that shipper?

A. No, sir; it was done under an order of the Interstate Commerce Commission.

391 Cross-examination by Mr. NORMAN, for plaintiff:

Q. Mr. Dulaney, I will take up first this matter mentioned last of the Nashville Tie Company. Does that opinion of the Interstate Commerce Commission, or order, give the number of that car, or the date on which it moved?

A. The opinion itself does not, but the complaint does.

Q. Well, what is it?

A. There are four cars.

Q. Is L. & N. car No. 20287 on there?

A. Yes, sir.

Q. Shipped June 21, 1911?

A. Yes, sir.

Q. Is N. O. & N. E. Car No. 448 on there, shipped from St. Louis to Louisville, and reconsigned to Bloomington, Indiana?

A. No, sir; there is no N. O. & N. E. car.

Q. Then, with reference to that car that Mr. Andrews on your day testified about, that that car was shipped by him, billed to Louisville, care of an agent, billed to Bloomington, and that you assessed the higher rate on it—the 5th class rate on it—and afterward refunded down to the lumber rate. He also testified about your 392 complaint before the Interstate Commerce Commission.

you prepared to say that the car that Mr. Andrews was referring to was contained in that Interstate Commerce Commission proceeding, or was referred to in any way in that Interstate Commerce proceeding?

A. I didn't hear Mr. Andrews at all, and I don't know anything about his testimony. Did he give the date of the movement?

Q. Yes, sir; I think he does, September 16, 1911, N. O. & N. E. car No. 488, shipped September 16, 1911, from Stovall, Ky., to Nashville Tie Company, care of the K. & I. Bridge Company at Louisville, Ky. In the correspondence had by the Nashville Tie Company with S. R. Wilcox, Agent of the L. & N., it is referred to as No. 1533 Box. We desire to call on the defendant to produce the file if they are going to undertake to contradict that evidence?

A. It is not in the Louisville office. It is in Mr. Wilcox's file in Nashville.

Q. You don't mean to say that that refund was not made in any way Mr. Andrews claims? That is, without litigation?

A. I made no statement whatever about Mr. Andrews' refund. I didn't hear Mr. Andrews' statements. I don't know what it was and I made no statement whatever.

Q. You undertook to testify, and I understood you to say that this refund which you made to Mr. Andrews, and which you were claiming you would not make to us under similar circumstances, was made to Mr. Andrews by reason of a decision of the Interstate Commerce Commission. I want to know whether or not you mean for the jury to believe that that is the case?

The COURT: I sustain an objection to that.

Q. As I understand you then, that car N. O. & N. E. No. 448 was not included in that order of the Interstate Commerce Commission?

A. In the order I refer to, that car is not included.

Q. Now, Mr. Dulaney, you have read the various tariffs of the L. & N. Railroad, applicable to cross-ties in interstate shipments since 1902. I will ask you if it isn't true that in each issue some of the L. & N. Railroad were omitted from the classification and were given 5th class on railroad cross-ties?

A. That classification, or classified rating applied to all locomotives.

tions on the L. & N. Railroad. It is possible that from some stations the commodity rates were published.

Q. What do you mean by "commodity rates?"

394 A. A rate specifically applying on cross-ties, and with no relation to the rate on anything else.

Q. Commodity rates were published the same as lumber rates?

A. I didn't say that. I don't know; I didn't look that up.

Q. I will ask you if it isn't true that as these tariffs were published, from time to time, that that classification was not made applicable to a number of stations, new stations, from time to time, by reason of the fact that the Interstate Commerce Commission had ordered that no rate from those specific stations should be higher than the rates contemporaneously charged on lumber?

A. That wouldn't be applied—the classification rating would not be applied where there was in effect a commodity rate.

The COURT: Is that shown in the publication of the rates, Mr. Dulaney?

The WITNESS: No, sir; that would go to the tariff itself. I would have to get the tariff covering the particular origin and destination before I could tell.

The COURT: I understood you to say that this publication
395 here, from which you read, is the publication of the tariff on the various articles and classifications of freight that you have referred to, and particularly on cross-ties?

The WITNESS: That was the classification of cross-ties on the L. & N. Railroad for the periods I gave. There may have been from some stations commodity rates lower or higher than that. I don't know. I don't know what the figures were. That was the classification rating that applied in the absence of a commodity rate. That applied over the whole L. & N. system. Commodity rates would be only from one specific points to one destination.

The COURT: The commodity rate would supersede the classification?

The WITNESS: As to the specific application to the commodity itself.

Q. You said it may be lower or it may be higher. Don't you know as a matter of fact there would be no commodity rate published on cross-ties higher than the 5th class rate?

396 A. I couldn't say that, Mr. Norman.

Q. Did you ever hear of a commodity rate on cross-ties that was higher than the 5th class rate?

A. I don't know; I never took occasion to look into that.

Q. Take L. & M. Tariff, Local Tariff No. 1, I. C. C. No. A-11282, effective January 23, 1910. I will ask you if that tariff don't show on page 85 quite a number of stations that took a commodity rate on cross-ties? (Having passed tariff to witness).

A. Yes, sir.

Q. I will ask you to refer to your tariffs, and ask you to ascertain what the 5th class rate on cross-ties was at that time from those stations?

A. Do you want the rate read in, or simply refer to pages?

Q. I want you to take each one of those stations and read the commodity rate is from that station, and then read the 5th class rate is from that station to Louisville?

A. To Louisville from station Smith's Switch, Ky., to A. ville, Ky., inclusive, the commodity rate on cross-ties was from the same stations the 5th class rate was from Smith's

397 Boston and Beech Fork, 18 cents Nelsonville, 20 cents 22 cents; Athertonville, 22 cents. From stations Ne to Chicago, Ky., inclusive, the commodity rate was from the same stations, 5th class, was 22 and 24 cents; 22 ce stations New Haven, Gethsemane and New Hope, and from stations Willow Spring to Chicago, Ky., inclusive; t tions Loretto to Lebanon, Ky., inclusive, the commodity r cents, and the 5th class rate from Loretto 25 cents; from l cents; from St. Mary's 26 cents, and Lebanon, 28 cents.

Q. I will ask you, Mr. Dulaney, to refer to your tariff, and jury whether or not the commodity rate published on railro ties, is not, in each instance, the same as the lumber rate— rate, that is, that was contemporaneously in effect on lum

A. I haven't the rates on lumber.

Q. I have it, but unfortunately the date is torn off. (tariff to witness).

A. I can't say that this tariff was in effect, or that these rates. I couldn't answer from that tariff; I don't know v even.

Q. You haven't a lumber tariff with you?

A. No, sir.

Q. Will you produce your Lumber and Forest Product

A. If my attorney says so.

398 Mr. BRUCE: Yes, there is no objection to that.

Q. Now, Mr. Dulaney, what rate was effective on cross-ties, carloads, from points on the L. & N. system in K on the intra-state shipments?

A. The lumber rates, the same rates as on lumber.

Q. Do you know why that was?

A. In pursuance to an order of the Kentucky Railroad sion.

Q. I will ask you if these commodity rates which you were published from new stations which was the same as if they weren't published pursuant to various orders of f state Commerce Commission?

A. I am not prepared to answer that; I couldn't say with ing up the record on it.

Q. Do you know whether you ever, prior to this tariff February 18, 1913, published any commodity rates on unless it was pursuant to the order of either the Interstate Commission, or the Kentucky Railroad Commission?

A. I couldn't answer that definitely.

Q. Have you any tariff here, Mr. Dulaney, that gives a rates?

A. No, sir.

999 Q. I will ask you to refer to your tariffs and tell us what was the rate on railroad cross-ties, carloads, during the year 1911, from East Bernstadt, Ky., to Louisville, Ky., and Cincinnati, Ohio, respectively, when for interstate movement—either for 1911, or most any year which you have before you?

A. The only tariff I have is the one you handed me, and in that tariff there is no—

Mr. BRUCE: What tariff is that? What is the effective date?

The WITNESS: Louisville Local Tariff No. 1, I. C. C. No. A-11282, effective December, 1909, and January, 1910. Apparently all of the supplements are not attached.

The COURT: Have you a duplicate of that publication in your book, Mr. Dulaney?

The WITNESS: I have it in my office.

The COURT: You haven't it here with you?

The WITNESS: No, sir.

A. In supplement No. 45 to this tariff, and supplement No. 26, to I. C. C. No. —, effective on interstate traffic, August 1, 1912, there is a rate of ten cents on cross and switch ties, carloads, from 400 East Bernstadt, Ky., to Louisville, bearing the reference "issued in compliance with order of Interstate Commerce Commission in case 4057."

Q. Refer to the tariff, and tell us what it was before the order of the Interstate Commission?

A. 33 cents.

Q. It was 33 cents before the order of the Interstate Commission, and made 10 cents by the order of the Interstate Commerce Commission, is that it?

A. Yes, sir.

Q. What does that supplement to which you have referred show the rate to be from Broadhead to Louisville?

A. Supplement No. 45, to Louisville Local Tariff No. 1, Supplement No. 26 to I. C. C. No. A-11282, shows rate of 10 cents from Broadhead.

Q. What does the note say about that?

A. "Issued in compliance with order of the Interstate Commerce Commission in case No. 4206."

Q. I will ask you what that supplement shows with reference to the rate on cross-ties from Wolf Lick and Lewisburg to Louisville, for interstate?

A. It shows a rate of 10 cents.

Q. What does the note say?

A. "Issued in compliance with order of Interstate Commerce Commission in case No. 4206 as to Wolf Lick, and in case 4050 and 4206 as to Lewisburg."

401 Q. What division of your road are those stations on?

A. Owensboro & Nashville Division.

Q. What were the rates from those stations to Louisville on cross-ties, carloads, interstate, prior to the order of the Interstate Commerce Commission?

A. The rates were, from Wolf Lick, 32 cents, and Lewisburg, 32 cents.

Q. What were they made by order of the Interstate Commerce Commission?

A. 10 cents by the Interstate Commerce Commission.

The COURT: What was the lumber rate from these points?

The WITNESS: I haven't that here, Judge.

Q. Mr. Dulaney, don't you know, or do you know, that in all the orders of the Interstate Commerce Commission or any of them, and all of those rates were fixed pursuant to orders of the Interstate Commerce Commission, are fixed the same as the lumber rate?

A. Well, in all of these orders, I assume they were.

Q. That is what the Interstate Commerce Commission always fixes it at, isn't it?

402 A. I can't say that; no, sir.

Q. Mr. Dulaney, while that rate of 32 cents from Wolf Lick was in effect on cross-ties, carloads, to Louisville, when for beyond, what was the rate that was in effect on cross-ties, carloads, for Louisville proper?

A. I haven't the figures here, Mr. Norman.

Q. Well, you know that these intra-state rates on ties were the same as the intra-state rates on lumber?

A. That was the order of the Kentucky Commission.

Q. Assuming it to be the fact that the rate on cross-ties to Louisville for beyond, was 32 cents, when the rate on cross-ties to Louisville proper, from the same stations, was 10 cents, can you give any reason for this difference?

A. No, sir; that is something I have nothing whatever to do with.

Q. Did you have anything to do with fixing any of these rates?

A. No, sir.

Q. Did you have anything to do with fixing any rates?

A. Yes, sir.

Q. But have never had anything to do with fixing any tie rates?

403 A. No, sir.

Q. Who has done that?

A. That has been in effect, the 5th class rate on ties, on the L. & N., has been in effect ever since I took employment with the L. & N. Railroad Company, over nineteen years ago.

Q. Do you know why that wasn't changed by your rate making department after the Interstate Commerce Commission had held that the rates were not justifiable on cross-ties higher than on lumber?

A. No, sir; I don't.

Q. Are you familiar with the decision of the Interstate Commerce Commission in the case of Chicago Car Lumber Company against the L. & N. Railroad Company? Have you read that opinion of the Commission?

A. No, sir, I don't know what decision you are referring to.

Q. Do you not read all decisions of the Interstate Commerce Commission, in which the L. & N. Railroad Company is a party?

A. No, sir.

Q. I hand you the Decisions of the Interstate Commerce Commission, Opinion No. 13,393, decided October 10, 1910, case No. 36, Chicago Car Lumber Company vs. Louisville & Nashville Railroad Company, which has already been introduced in evidence as Exhibit P. (Handing paper to witness.)

A. No, sir; I don't recall ever having seen this before.

Q. Well, if anybody, any official of the Louisville & Nashville Railroad Company—if a change were to be made in the rate on railroad cross-ties, interstate, what official of the L. & N. Railroad Company would have that in charge?

A. Any official of the L. & N. Railroad in the traffic department might have it in charge.

Q. You could have done it, couldn't you?

A. No, sir; I have no authority to do it. I could have done it.

Q. You could have recommended it?

A. I could have done that, but I wasn't prepared to sever my connection with the L. & N. Railroad.

Q. Why would that cause you to sever your connection with the L. & N.?

A. I would have had no authority whatever for it, and no reason for doing it.

Q. How do you go about changing a rate. You say you have changed some of them?

A. Some of them I don't consider even.

05 The COURT: How are they changed by the L. & N.?

By the WITNESS: By the different officers of the Company. They would be authorized—the changes would be authorized. There is a great deal of traffic of the L. & N. that I never consider the rates on at all.

Q. Do you conceive it to be part of your duty as an employe of the Louisville & Nashville Railroad Company, when it comes to our knowledge that a rate is being charged by that company that has been condemned by the Interstate Commerce Commission, or a principle being employed by the Company which has been condemned by the Interstate Commerce Commission, to call that fact to the attention of your fellow employes and officers in the rate making department?

A. No, sir; because all of those orders come to the heads of the traffic department, and I assume that the traffic department knows what those orders provide, and will instruct as to whether or not any changes should be made.

Q. Who is the head of the Traffic Department?

A. The Third Vice President is head of the Traffic Department?

Q. Mr. Smith?

A. Yes, sir.

Q. Addison R. Smith?

A. Yes, sir.

106 Q. And you wouldn't feel—your duties are such that you wouldn't feel it proper for you to make any suggestion or recommendation on that score?

A. No, sir; my duties were such—you are speaking about this

order of the Chicago Car Lumber Company? My duties were such that I wouldn't, if it had been drawn to my attention, have made any suggestion about what should be done?

Q. Well, what about your duties now? You have changed since then, haven't you?

A. My present duties are properly in the line of commerce work.

Q. Would not this be a part of your duties under your present employment?

A. Not necessarily; no, sir.

Q. Mr. Dulaney, I hand you L. & N. Railroad tariff G. F. O. No. 1966, I. C. C. No. A-12693, on Cross and Switch-ties, wooden, carloads, from stations on the L. & N. Railroad, to Ohio and Mississippi River crossings, and stations on the L. & N. Railroad named therein, effective February 18, 1913. I will ask you if by that tariff commodity rates are not established from practically every station on your road in Kentucky on cross-ties?

A. I think this covers the majority of our stations in Kentucky.

407 Q. I will ask you if you will not examine your tariff, or ascertain in whatever way you please, at your office, whether these rates are not the same as the rates now in effect from the same stations to the same stations, on lumber?

A. I will have to have that checked, and it will take sometime to do that.

Q. Wouldn't the man who issued that tariff know whether that was true or not?

A. I don't think the man who issued the tariff would answer that off-hand, without going to the records and checking it.

Plaintiff moves the court that the defendant be required to produce its lumber tariff, and that plaintiff be given an opportunity to cross-examine this witness with that lumber tariff before him.

Mr. NORMAN: He has come here and brought all the tariffs except the one we think is important.

Defendant objects to the statement of counsel, and the court sustains the objection, and directs the jury not to consider it.

408 The Court overrules the plaintiff's motion, and the plaintiff excepts to the ruling of the court.

Q. Do you know why that tariff, putting a commodity rate on ties, was published?

A. I am not familiar with the instructions at all under which this tariff was published. I assume it was done to bring into one issue all of our cross-tie rates.

The COURT: Is that publication you are speaking of effective February 18, 1913?

The WITNESS: Yes, sir.

Q. I will ask you to refer to your classification which gives the 5th class rate from those stations, and ask you to compare that 5th class rate with the rate made effective by that tariff there, from any five stations which you may select?

A. I would prefer that you select them.

Q. Take Smith's Grove, Ky.?

A. 5th class rate is 32 cents; commodity rate on cross-ties, 8 cents.

Q. Take Auburn, Ky.?

A. The 5th class rate from Auburn to Louisville, 32 cents; commodity rate on cross-ties, 9 cents.

Q. Take Island, Ky.?

A. 5th class, 32 cents; commodity rate on cross-ties, 10 cents.

Q. In order not to prolong the examination, I will ask you to look through that tariff and see if you can find any station from which the commodity rate as contained in that new tariff is not at least 50% less than the 5th class rate?

A. I couldn't say that, Mr. Norman, without going through and checking this against all rates; it would probably take three or four hours.

Q. You are familiar with the 5th class rate in a general way, and the lumber rate?

A. I am not sufficiently so to permit me to answer in a definite way your question. There are 5th class rates between every station on the L. & N. Railroad, and I can't carry all of those things in my head.

Q. As a general proposition, how does the 5th class rate compare with the lumber rate?

A. It is higher than the lumber rate.

410 Redirect examination by Mr. BRUCE for the defendant:

Q. I will ask you to look at a paper which has been brought to me, and ask you to state whether or not that is a voucher by which the refund of that car No. 488, was paid? (Handing paper to witness.)

A. This is a voucher paying to the Nashville Tie Company \$128.18, in connection with a shipment of ties from Stovall, Ky., in N. O. & C. N. car No. 488, shipped out of Stovall on September 17, 1911.

Mr. BRUCE: Is that the car, Mr. Norman?

Mr. NORMAN: Yes, sir.

Q. When was that paid?

A. That was paid November 13, 1912.

Q. When was the order of the Commission made which required lumber rates to be charged on shipments of cross-ties from Stovall?

A. This case of the Nashville Tie Company?

Q. Yes?

A. June 6, 1912.

Q. State whether or not that refund was made after this Commission's order.

A. Yes, sir.

411 Recross-examination by Mr. NORMAN, for plaintiff.

Q. Mr. Dulaney, if that movement was not included in the order of the Commission, would it be proper for you to make that refund,

without first applying to the Commission for permission to do so. Notwithstanding the fact that the Commission had condemned the rate?

Defendant objects, and the court sustains the objection.

The COURT: Mr. Dulaney, was there any publication fixing the tariff on cross-ties at the lumber rate published, or were there any charges upon cross-ties upon the lumber rate, interstate, at any point upon the L. & N. Railroad in Kentucky, other than such points as the rate had been fixed upon application by complainant before the Interstate Commerce Commission, until the publication of the commodity rate going into effect February 18, 1913?

The WITNESS: I couldn't answer that without checking all of the tariffs to ascertain that.

412 The COURT: Do you know of any such publication and charge and fixing of the rate for cross-ties on the lumber rate?

The WITNESS: I can't at the moment recall anything.

J. B. ARBEGUST was the next witness called on behalf of the defendant, and being first duly sworn, testified as follows, in response to questions by Mr. Bruce:

Q. Mr. Arbegust, you are Superintendent of Terminals of the Louisville & Nashville Railroad Company, are you not?

A. Yes, sir.

Q. Did you hold that position during the year of 1911?

A. Yes.

Q. Do you remember whether or not for a while during the year 1911, the Ohio Valley Tie Company was required to receive its ties brought here, destined to Louisville, for the Ohio Valley Tie

413 Company, on the team tracks of the L. & N. Railroad?

A. Yes.

Q. How long did that continue, and if it was changed what was the change?

A. It lasted probably two or three weeks, to the best of my recollection.

Q. Then, was any change made?

A. Later the arrangements were changed on an understanding with the Superintendent of the Pennsylvania Railroad Company for such ties going to that line as the L. & N. Railroad Company would turn the cars over to his line at Louisville for unloading at Louisville, provided the cars were unloaded at Louisville and promptly returned to the L. & N. Railroad Company at Louisville.

Q. Was that arrangement then carried out?

A. It was.

Q. And the ties handled in that way?

A. They were.

Q. Do you know why that requirement was made, Mr. Arbegust?

A. I do not.

414 Cross-examination by Mr. NORMAN, for plaintiff:

Q. How long has that continued, about requiring this trans-

A. I don't know, sir. I haven't paid any attention to it for a month, and I thought the whole thing had been settled.

Q. Aren't you still requiring it?

A. I don't know, sir. My attention hasn't been called to it.

Q. What is the latest time that you know of, that it was required?

A. Well, I couldn't answer that, Mr. Norman. I don't know.

415 H. G. DEMPF was the next witness called on behalf of the defendant, and being first duly sworn testified as follows, in response to questions by Mr. Bruce:

Q. This is Mr. H. G. Dempf, I believe?

A. Yes, sir.

Q. And you are the Local Freight Agent of the Louisville & Nashville Railroad Company at Louisville?

A. Yes, sir.

Q. And have held that position for a number of years?

A. Yes, sir.

Q. Mr. Dempf, are freight bills to shippers made out in your office?

A. Yes, sir.

Q. I wish you would state whether or not there was ever at any time any discrimination against the Ohio Valley Tie Company by the Louisville & Nashville Railroad Company in the making or charging of rates on cross-ties?

A. No, sir; there never has been.

Q. Was it treated exactly like every other shipper of cross-ties?

A. Yes, sir.

Q. Do you recall when the question first came up in your
416 office, as to whether or not certain shipments of cross-ties should be considered as interstate or intrastate, and whether the interstate or intrastate rates should be applied upon them?

A. I think it was sometime in December, 1910, when my office had up—No; I believe it was before that. It was in the year of 1910.

Q. I show you a letter which has been put in evidence already by the plaintiff, being a letter of July 26, 1910, from yourself, H. G. Dempf, Agent, to the Ohio Valley Tie Company, and ask you to examine that letter—it has already been read in evidence,—and state whether or not that shows that it was being considered in your office in July, 1910? (Handing witness Exhibit F.)

A. Yes, sir.

Q. Just, in this connection, I will ask you to read that letter.

The Witness reads Exhibit F, as follows:

"LOUISVILLE, Ky., July 26, 1910.

Ohio Valley Tie Co., Louisville, Ky.

GENTLEMEN: During the month of April 1910, there were quite a number of cars loaded with ties from Lewisburg, Ky., consigned to N. Y. C. & St. L. Ry., routed via Pennsylvania.
417 These ties I understand, were shipped for your account.

In billing cars to connections we assessed the lumber rate of 1¢ per cwt., but according to instructions from the General Freight Office, this rate does not apply on ties in interstate movement. We have no commodity rates, fifth class rate should apply: We issued corrections to the Monon, changing rate from 10¢ to 32¢ per cwt. but same are returned declined, claiming consignees are not in position to pay having made settlement with you. As you received benefit of this undercharge, will you kindly advise if you will accept corrected bills based on 32¢ per cwt., to Louisville and pay us the difference?

Under rulings of the Interstate Commerce Commissioners, we understand, we are compelled to charge and collect at the published tariff rate.

Yours truly,

H. G. DEMPF,
Agent, A. W. H.

418 A. cont'd). There is a typographical error there. It is routed via Pennsylvania.

Q. You had better finish reading the letter.

The witness continues reading the letter.

Q. Prior to the time that this matter came up, had your personal attention been called to the fact that certain shipments of cross-ties were being charged for on intra-state rates, when they were in interstate shipments?

A. I think not. Not my personal attention that I can recall.

Q. A number of bills of lading have been submitted by the plaintiff in this case, being bills of lading along in 1909 and 1910, upon which it is said that the intra-state rate was charged. Those bills of lading have not been put in evidence, because we did not want to clutter the record, but I will ask you if you have looked over the bills of lading to ascertain whether the destination shown by any of those bills was other than Louisville?

A. None that I can find, and I have examined them.

Q. Is the destination on all of them shown to be Louisville?

A. Yes, sir.

Q. Do you know whether, as a matter of fact, those shipments were interstate or intra-state shipments?

A. I do not.

419 Q. So far as you know, was the question raised prior to some time in the year 1910, as to whether shipments of cross-ties of that character were interstate shipments, or intra-state shipments, or whether one rate or the other rate? Was the question I ask raised prior to some time in 1910, as to how shipments of this kind should be treated?

A. Not that I can recall.

Q. Has the Interstate rate on cross-ties been applied to shipments of cross-ties that were known or believed to be interstate shipments, alike, whether by all parties?

A. Yes, sir.

Q. Three bills of lading have been put in evidence by the plaintiff.

in this case, marked Exhibit T. One of these bills of lading, and only one of them, being a bill of lading dated April 5, 1910, for cross-ties, consigned to N. Y. C. & St. L. Railway, shows the destination to be Erie, Pa. Can you state whether that is the shipment that is referred to in the letter which you read here a moment ago?

A. This letter of July 29th, 1910, doesn't specifically state any shipment, but my recollection is that there were several of those cars that were passed by the clerks in the office, and afterwards the undercharge was endeavored to be collected from the Ohio Valley Tie Company, and also the Monon Railway.

Q. Mr. Dempf, one bill of lading has been filed in this case, marked Exhibit S, dated December 11, 1912, showing a shipment from Colesburg, Ky., of a carload of ties, to H. D. Fowler Bros., at Louisville, Ky., which is said afterwards to have been consigned to some place north of the river, to Thomason, Ind., and on which it is stated that the intra-state or state rate of freight was charged. Do you know anything about the facts of that particular case, as to how that happened, or why it was done?

A. No, sir; I don't.

Q. Had you had it brought to your attention, so far as you know, prior to the time it was introduced in evidence here?

A. No, sir.

Q. When cars come here, destined for Louisville—I mean destined to Louisville, according to the way-bill, and a freight bill is made out in your office, what is done with that freight bill?

A. It is sent to the shipper for collection.

Q. Is it sent by your office, or is it sent to the Cashier?

A. They frequently call there and settle for them. The practice, however, is to send them out to the consignee.

Q. Does your office send them, or the Cashier?

A. The Cashier.

Q. Do you mean the Cashier of your office?

A. Yes, sir.

Q. If, after a freight bill has been made out, and put in the hands of the Cashier for collection, there is a reconsignment of that freight, does the fact come back to your office? Do you know of the reconsignment?

A. In a case of that kind, it should be taken to the rate clerk, if the shipment is going beyond here.

Q. You can't recall at all, as I understand you, this particular case I have mentioned to you here, as to how that was handled, or why that rate was charged?

A. It may be that Mr. Fowler called at the office, and had that car reconsigned to some other line, and that the man handling it made the reconsignment.

Q. Mr. Dempf, in an office of a concern the size of the Louisville & Nashville Railroad, do single cases of this kind sometimes go through by mistake, or by the oversight of the clerk?

A. Yes, sir; no clerks are infallible.

Cross-examination by Mr. NORMAN, for plaintiff:

Q. I hand you bills of lading for fifty cars, shipped from point in Kentucky on the L. & N. Railroad to Shirley, Ind., between December 1, 1911, and June 30, 1912, and ask you if the paid receipts don't show that you moved these cars at the lumber rate, these shipments being shipments of railroad cross-ties by the Ohio Valley Tie Company?

Defendant objects, but the court overrules the objection, to which the defendant excepts.

A. There is nothing there for me that would enable me to answer that question.

Q. Mr. Dempf, don't you make the connecting carrier, to which you deliver these goods in Louisville, for delivery by it at destination—don't you make that carrier your agent to collect that part of your freight?

Defendant objects, and the court sustains the objection, to which the plaintiff excepts.

Q. I asked you at what rate these shipments were made?

A. I would have to consult my records on that.

Q. I will ask you to do so, and state to the jury, after consulting the records, at what rate those shipments were made?

The COURT: Can you do that?

The WITNESS: I think so.

Q. I desire to ask you that question with reference to some of the shipments included in the previous question, and some fourteen other shipments that were made in like manner during the year 1910, bills of lading and paid freight receipts for which I furnished you there. Mr. Dempf, it has been testified here that during the years 1908 and 1909, and part of 1910, I charged only the lumber rate on all shipments of cross-ties, interstate or interstate. I will ask you whether or not that is true?

A. I don't know, sir.

Q. Can you ascertain by examining your records as to whether or not that is true, or substantially true?

A. It would take some time to do it.

Q. I show you a bill of lading issued by the Louisville & Nashville Railroad Company, October 29, 1910, to the Ohio Valley Tie Company, for a shipment of one car of oak ties, from Lyons, Ky., Louisville, Ky., together with a letter, dated October 31st, 1910, from the Ohio Valley Tie Company, addressed to you, which letter reads as follows:

"October 31, 1910

Cashier's Office.

Mr. H. G. Dempf, Agent, L. & N. R. R., Louisville, Ky.

DEAR SIR: Car P. R. R. No. 931, 511, ties, from Lyons, Ky.

424 The above shipment consigned to this company at Louisville, you will please forward to N. Y. C. & St. L. Railroad.

Company are of A. W. Johnston, Erie, Pa., via Monon, to South
Wanitat, Indiana, and N. Y. C. & St. L. to destination, and let all
charges follow."

Q. (Cont'd.) I will ask you to ascertain from your records
whether or not that request was made, and at what rate the ties
went forward?

A. Yes, sir.

Q. Will you do so?

A. Yes, sir.

Q. I hand you bill of lading for a similar shipment dated October
11, 1910, together with a similar letter, dated October 12, 1910, and
ask you if you will ascertain from your records whether or not you
obeyed those instructions, and if so, at what rate the shipment was
moved?

The witness does not answer the question.

Redirect examination by Mr. BRUCE, for the defendant:

Q. Mr. Dempf, as to those last two shipments which you were
asked about, to-wit, bill of lading on a car of ties from Lyons, Ky.,
to Louisville, Ky., October 29th, 1910, and bill of lading
125 of October 11, 1910, from Lyons, Ky., to Louisville, Ky.,
I will ask you to examine the tariff effective January 30,
1910?

A. At the dates of those two bills of lading the rate from Lyons
to Louisville was a commodity rate on cross-ties in the state.

Mr. NORMAN: If that is true, we will withdraw the question and
those bills of lading.

Counsel for plaintiff examines the tariff, and says he will withdraw
the questions with reference to the last two bills of lading.

W. P. HOWARD was the next witness called on behalf of the de-
fendant, and being first duly sworn testified as follows, in response
to questions by Mr. Bruce:

Q. This is Mr. W. P. Howard?

A. W. P. Howard.

Q. You are Superintendent of the Owensboro & Nashville
Division of the Louisville & Nashville Railroad Company,
126 are you not?

A. Yes, sir.

Q. And have been for eight years?

A. For eight years.

Q. Mr. Howard, have you a copy of a letter that you wrote to
Mr. Bush, of the Ohio Valley Tie Company, on the subject of a
shipment of cross-ties from the Owensboro & Nashville Division of
the L. & N. Railroad Company, in the summer of 1911?

A. Yes, sir.

Q. And the answer to it?

A. Yes, sir.

Q. Will you let me see those, please?

A. Yes, sir.

Witness hands the letters to counsel.

Q. Was this letter of August 4, 1911, written by you to Mr. Bush, of the Ohio Valley Tie Company?

A. Yes, sir.

Q. And did you receive from him the letter of August 15, 1911, which I show you?

A. Yes, sir.

Counsel for defendant reads the letters as follows:

"Aug. 14, 1911.

427 Mr. C. P. Bush, Ohio Valley Tie Co., Louisville, Ky.

DEAR SIR: You have a large number of ties at Belton and Du mor, Epley and Island, on our property, which are very much the way, and I will thank you to arrange to have same shipped promptly and oblige.

Yours truly,

SUPERINTENDENT."

Said letter is filed herewith as Exhibit No. 10.

"LOUISVILLE, KY., 8/15/11.

W. P. Howard, Supt., L. & N. R. R., Russellville, Ky.

DEAR SIR: Answering your letter of Aug. 14th, we beg to advise that we have just closed a large contract with the Pennsylvania R. R., which will allow us to commence shipping from all the stations named in your letter. We hope to begin to load out early next week.

Yours truly,

OHIO VALLEY TIE CO.

428 Said letter is filed herewith as Exhibit No. 11.

Q. Mr. Howard, state whether or not at the time you wrote your letter of August 14, 1911, just read, the cross-ties of the Ohio Valley Tie Company had been lying on the L. & N. property at the stations named for quite a considerable length of time?

A. Yes, sir.

Q. State whether, as far as you know, Mr. Howard, all orders from the Ohio Valley Tie Company for cars to ship out cross-ties on Owensboro & Nashville Division of the L. & N. Railroad were filled?

A. Yes, sir.

Q. State whether or not there was any more delay in filling orders for cars for that company for the shipping of cross-ties than for other persons who desired cars to ship commodities off of that division?

A. No, sir; there was not.

Cross-examination by Mr. NORMAN for plaintiff:

Q. Mr. Howard, what instructions did you receive during the fall of 1911, or during the year of 1912, with reference to
429 handling the business of the Ohio Valley Tie Company—
instructions from your superior officers?

A. I receive a good many instructions about different shippers, and I don't recall just what I received about that particular company. We get so many instructions, that I don't remember of any specific instructions.

Q. Did you get instructions in the way of circulars?

A. We got a good many circulars.

Q. Didn't you get one instruction not to furnish them anything other than L. & N. cars?

A. I don't remember that particular circular,—no, sir.

Q. During the years 1911 and 1912, did you furnish cars to the Ohio Valley Tie Company for their shipments other than L. & N. cars?

A. Yes, sir.

Q. Do you mean to say that during that period the Ohio Valley Tie Company was allowed to load foreign cars—cars of foreign roads on your line, or on your division?

A. Yes, sir.

Q. In every instance, just like any other shipper?

A. I don't remember every instance.

Q. I mean, just like any other shipper?

430 A. I don't remember of any—I remember of furnishing foreign cars for ties. We also furnished foreign cars for other shippers.

Q. Mr. Lannan is Roadmaster on your road, isn't he?

A. Yes, sir.

Q. Is he here, do you know?

A. No, sir.

Q. Mr. Howard, I show you a letter which has been filed in evidence here, written to you on March 2, 1912, by the Ohio Valley Tie Company, which I will ask you to read. (Handing witness Exhibit No. 5.)

A. I have read it.

Q. In that letter, you are requested to make requisition on the Pennsylvania for equipment in which to move ties for the Ohio Valley Tie Company. Did you make that requisition?

A. My recollection is I answered the Ohio Valley Tie Company, and told them that requisition for foreign cars had to be made through the Superintendent of Transportation at Louisville, Mr. Phelps.

Q. Wasn't it your custom to make it through Mr. Phelps' office?

A. No, sir—yes, sometimes we did, and sometimes the shipper applied direct through Mr. Phelps, but on this particular
431 occasion I think I answered you, telling you we would continue to do the best we could for you, and suggested that you

Witness reads the letter as follows:

"LOUISVILLE, KY., September 30, 1911

Mr. H. G. Dempf, Agent, 9th & Broadway.

Mr. J. P. Fulwiler, Agent, 1st & Water.

DEAR SIRs:

Delivery of Cross-ties at Louisville on Order of the Jefferson Court.

Pursuant to a restraining order of the Jefferson Circuit September 26, 1911, the following cars of ties, consigned to the Valley Tie Co., care Pennsylvania Co. at Louisville, Ky., have been received at your station, and which have been delivered

L. & N. No. 3955

B. & O. No. 73381

O. G. & N. E. No. 139

N. Y. N. H. & H. No. 89093

C. of Y. No. 3388

M. C. No. 44902

437 L. & N. 12848

Southern No. 136860

D. L. & W. No. 36549

charge must be collected thereon, on basis of the Kentucky state rates;

Also to deliver immediately upon arrival at Louisville, Pennsylvania Co., upon the tracks in Louisville, Ky., of the burgh, Cincinnati, Chicago & St. Louis Railway Company, as the Pennsylvania Lines West of Pittsburgh, and control the Pennsylvania Terminal Railway Company, all cars which the Railroad Company may receive, consigned to the Valley Tie Co., care Pennsylvania Company.

Also to deliver to the Big Four, upon its tracks in Louisville, cars of ties which we have received for shipment by the Ohio Tie Company from stations on our roads in Kentucky to Louisville, Ky., consigned to the Big Four or the Cleveland, Cincinnati & St. Louis Railway Company.

To deliver immediately upon arrival at Louisville to the C. & St. L. Ry. Company, or the Big Four, upon their tracks,

of ties which we may receive, consigned to the C. & St. L. Ry., or the Big Four at the Kentucky intrastate rates applicable on cross-ties.

Payments of freight charges that shall be tendered during the effectiveness of the Order of the Court should, if the intrastate rate is properly tendered, be accepted, but only under protest, a receipt in writing being given therefor to contain the following words:

"Received payment under Protest, and solely pursuant to the restraining Order of Jefferson Circuit Court, September 26th 1911."

Yours truly,

D. M. GOODWYN,
General Freight Agent

Said letter is filed herewith as Exhibit No. 12.

COPY BOOK

439 Q. Did you construe that letter to mean that all cars of ties consigned to the Big Four Railroad, without regard to what the destination was, Louisville or the other side of the river, should be turned over to the Big Four, and only the intra-state rate collected on the ties?

A. Yes, sir.

Q. And is that the way the business which went to the Big Four was handled?

A. Since this order of the court.

Q. I mean since that order of the court referred to in Mr. Goodwyn's letter?

A. Yes, sir.

Q. Did you understand that order to mean that cars in which cross-ties going to the Big Four were loaded had to go through in interstate commerce without change?

A. There were all foreign cars that evidently belonged to the Big Four.

Q. Do you mean those covered by these five cases?

A. Yes, sir.

Q. Was that difference made in the handling of cars that were destined to the Big Four, and the handling of cars destined to the Pennsylvania?

A. In the application of the rates?

Q. In any respect?

A. Not in the application of the rates.

440 Q. Do you mean that on cars of ties destined to the Pennsylvania, even if they were interstate shipments, that the intra-state rate was applied and collected on those ties, after the receipt of that letter from Mr. Goodwyn?

A. Yes, sir.

Q. Well, was there any difference in the handling of the cars themselves, as between the ties that were consigned to the Big Four, and the cars consigned to the Pennsylvania?

A. Difference in what respect?

Q. Difference in the matter of whether the ties were allowed to go through to destination, or to a point across the river in the cars in which they were originally loaded?

A. The interchange with the Big Four is a different interchange from the one made with the Pennsylvania. I know nothing whatever about this interchange of cars.

Q. You are holding up a paper and say "This interchange of cars"—do you mean the Big Four?

A. The Big Four; all of these are Big Four bills. I know nothing about the interchange of cars on the business through the Big Four.

Q. Would Mr. Arbegust, who testified here this morning know about that?

A. Probably he would.

441 Q. You were asked about 14 or 15 or 16 bills of lading handed to you, showing shipments of cars to the N. Y. C. & St. L. Railway, which, by the way, is the Nickel Plate, isn't it?

A. Yes, sir.

Q. (cont'd). —destined to points North of the Ohio River, and on those cars, although going in interstate commerce, were only the intra-state rates charged?

A. Yes.

Q. Were they all cars containing ties of the Ohio Valley Tie Company?

A. Yes, sir.

Q. Did the ties go through to destination in the cars in which they originally had been loaded?

A. I presume they did from the freight bills attached here as part of this delivery by the connecting lines.

Q. Were any of that last lot of cars, I mean, now, which I will briefly call the Nickel Plate shipments,—were any of them from stations which had commodity rates?

A. Yes, sir; I see one or two of them here. Here are two of them right here in front of me. One of them is from Boston, and the other is from Lyons, Ky.

Q. Mr. Dempf, do I understand you to say that after that order of injunction of the court, and after Mr. Goodwyn's letter
442 to you, that the Louisville & Nashville Railroad Company only charged and collected on cars of ties, in interstate commerce, the intra-state rate?

A. Yes, sir; under protest.

Recross-examination by Mr. NORMAN for plaintiff:

Q. These last 16 cars which you refer to, for the Nickel Plate, were in 1910, weren't they?

A. Yes, sir.

Redirect examination by Mr. BRUCE for defendant:

Q. Can you tell me how many of those Nickel Plate shipments moved from points which had the commodity rates on cross-ties?

A. I don't find but two—yes, here are some more. There are nine of them.

Q. Nine of these cars then had commodity rates on cross-ties, which were the same as the lumber rates, I suppose?

A. Yes, sir.

443 E. H. DULANEY, recalled, testified as follows, under further cross-examination by Mr. Norman:

Q. Mr. Dulaney, what was the lumber rate and the 5th class rate that was applicable from Colesburg, Ky., to Louisville, during 1912, and which of those rates applied to cross-ties? ?

A. I don't know that either one of them applied to cross-ties. I will have to look up that other tariff which you have.

Q. What other tariff are you talking about?

A. The Louisville Local.

Q. You can tell from that tariff unless it puts cross-ties in there, and then it takes that classification?

A. It will not if you have got a commodity rate in that local tariff where that Lyons rate is shown, and that other rate is shown.

(Counsel hands tariff to witness.)

A. The rate on lumber from Colesburg to Louisville was 6 cents, and the rate on ties, 5th class, 17 cents I don't know that 5th class rate was applicable on ties, but this tariff is not complete apparently, and I can't say what the rate was. There may be another supplement.

Plaintiff offers in evidence the restraining order in the case of Ohio Valley Tie Company vs. Louisville & Nashville Railroad Company, entered September 26, 1911, in case No. 58596, in the Jefferson Circuit Court. The court says it can

in.

An adjournment was here taken until 9 o'clock tomorrow morning.

Resumed at 9 o'clock Thursday morning, April 24, 1913, as per adjournment.

J. B. ARBEGUST, recalled, testified as follows, in response to questions by Mr. Bruce:

Q. Mr. Arbegust, you testified yesterday in this case, did you not?

A. Yes, sir.

Q. You then testified as to the requirement that cars of cross-ties consigned to Louisville to the Pennsylvania Railroad Company, or care of the Pennsylvania Railroad Company, should be unloaded and the cars returned to the L. & N. Do you recall whether or not subsequent to the injunction of the Jefferson Circuit Court in September, 1911, any cars of cross-ties came consigned to Louisville to the Big Four or care of the Big Four?

A. I had no knowledge or advice of any.

Q. As to cars of cross-ties that came to Louisville consigned on the bill of lading to points beyond Louisville, in other States, either on the line of the Big Four or on the line of the Pennsylvania, was there any limitation or restriction about those cars going on through destination without being unloaded?

A. There were none.

Q. Whichever line it was on or went to?

A. No matter what railroad company.

Cross-examination by Mr. NORMAN for plaintiff:

Q. Mr. Arbegust, in the absence of special instructions, if a car came here consigned to the Big Four, care of the Big Four, or care of the Monon, or any other railroad, you would deliver it to that railroad, wouldn't you?

A. In the absence of special instructions?

Q. Yes; from your superior officers?

A. I don't know that I would; that would depend on the agent.

Q. The agent?

A. The agent at Louisville would have to look after that.

Q. He would look after that and you wouldn't have anything to do with it?

A. If he made a report to me I would.

Q. If he reported to you he had a car there billed to the Monon Railroad, would you tell him to do that?

A. I would have to make inquiry of him why he made such a report to me. I wouldn't understand it.

Q. Why, he wouldn't make any such report, would he?

A. I don't know. I got very few of those kind of reports.

Defendant rests.

447 'Tendered' Nov. 29, 1913.

Filed in Court Dec. 6, 1913.

Attest:

LOUIS SUMMERS, *Clerk*,

By M. O. PORTER, *Deputy Clerk*.

Jefferson Circuit Court, Common Pleas Branch, Second Division.

No. 70975.

OHIO VALLEY TIE COMPANY, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

The foregoing 333 pages are a complete and accurate transcript of all the testimony offered upon the trial of this cause.

G. H. BOONE,

Official Stenographic Reporter.

Examined, approved and certified, and made a part of the bill of exceptions.

THOS. R. GORDON, *Judge*.

448 At the same time, to-wit, March 12, 1914, the appellant filed with the foregoing record a statement as follows:

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,

vs.

OHIO VALLEY TIE COMPANY, Appellee.

Statement.

The judgment appealed from herein was rendered on April 25, 1913, and will be found herein on page 97.

No summons or warning order is desired.

BRUCE & BULLITT,
Attorneys for Appellant, Louisville, Ky.

HINES & NORMAN,
JOHN B. BASKIN,
Attorneys for Appellee, Louisville, Ky.

Afterwards at a Court of Appeals held in and for the Commonwealth of Kentucky at the Capitol on April 13, 1914, the following order was entered, to-wit:

L. & N. R. R. Co.
vs.
Ohio Valley Tie Co.

Jefferson.

Came the appellant by counsel and filed notice and grounds and moved the court to grant an oral argument, which motion is submitted.

Came the parties by counsel and filed an agreement and on motion and by consent appellee is given to April 30th to file brief.

449 The following is the motion for oral argument filed by the foregoing order:

450 Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
OHIO VALLEY TIE COMPANY, Appellee.

Statement of Counsel.

This case involves not only a very large amount of money, but a certain very important question arising under the federal "Act to regulate commerce."

The judgment appealed from is a judgment of the Jefferson Circuit Court in favor of the Ohio Valley Tie Company vs. The Louisville & Nashville Railroad Company for Fifty-six Thousand, Nine Hundred and Seventy one and 56/100 (\$56,971.56) Dollars with interest from the date of the judgment.

The petition alleges that the defendant Railroad Company willfully and maliciously did various alleged wrongful acts for the purpose, and with the result, of injuring plaintiff's business. The principal acts complained of as being unlawful were the charging, maintaining and collecting unreasonable and excessive freight rates on the transportation of cross-ties in interstate commerce, with the alleged result of tying up plaintiff's capital and injuring its credit.

It appears, however, from the pleadings and the evidence that

plaintiff has heretofore filed a complaint against defendant before the Interstate Commerce Commission, complaining of these same rates on the same shipments that are involved in the complaint

this action, and that in the case before the Commission, complainant also asked for reparation on account of damages done plaintiff by this alleged unlawful act; and that the Commission decided the case in complainant's favor, held the rates to be unreasonable, and made an award of reparation for damages amounting to several thousand dollars, which award has been paid by defendant, accepted by complainant and thus satisfied.

Defendant (present appellant) insists that under the "Act to regulate commerce" a person claiming to have been injured by an alleged violation of the act by a carrier has an election to claim damages either before the Interstate Commerce Commission, or before a United States District or Circuit Court; but that he is required to elect between these two tribunals, and that if he goes before the Commission with his complaint for damages, and the Commission awards him damages and the carrier pays the same, this is the end of the matter, and the complainant cannot ask other damages elsewhere, based on the same alleged violation of the "Act to regulate commerce".

Defendant claims that while it is incumbent upon one claiming to be injured by the charge of unreasonable rates to go before the Interstate Commerce Commission and submit to it the question whether or not the rates are unreasonable, yet, if the Commission holds they are unreasonable, the complainant is not required to submit the question of damage to the Commission, but has an option as to whether he will submit that question to the Commission or to a federal district or circuit court; and that if he exercises this option, makes his election, goes before the Commission, gets damages awarded and collects the same, he cannot collect additional damages before any other tribunal. And defendant relies upon the very late cases of Mitchell Coal Co. vs. Pa. R. R. Co., 230 U. S. 247, and Pa. R. R. Co. vs. International Coal Mining Co., 230 U. S. 184, and Lehigh Valley R. R. Co. vs. Meeker, — Fed. R. —, decided February 19, 1914, not yet reported, as conclusive upon these propositions.

The appellant, therefore, asks for an oral argument of the case April 9, 1914.

HELM BRUCE,
Att'y for Appellant

Filed Apr. 13, 1914.

ROBT L. GREENE, C. C. A.

453 Afterwards on the 15th. day of April, 1914, at a Court Appeals held as aforesaid the following order was entered to-wit:

L. & N. R. R. Co.
vs.
OHIO VALLEY TIE Co.

Jefferson.

The Court being sufficiently advised the motion for oral argument herein is sustained and this case is ordered to be set for argument at the present term.

Afterwards, to-wit, on April 21, 1914, at a Court of Appeals held as aforesaid the following order was entered herein, to-wit:

L. & N. R. R. Co.
vs.
OHIO VALLEY TIE Co.

Jefferson.

Came the appellee by counsel and moved the court for additional time for oral argument in this case, which motion is submitted.

Afterwards at a Court of Appeals held on April 22, 1914, the following order was entered herein, towit:

L. & N. R. R. Co.
vs.
OHIO VALLEY TIE Co.

Jefferson.

The court being sufficiently advised the motion for additional time for the oral argument herein is overruled.

454 Afterwards at a Court of Appeals held as aforesaid on May 5, 1914, the following order was entered herein, to-wit:—

L. & N. R. R. Co.
vs.
OHIO VALLEY TIE Co.

Jefferson.

On motion of the appellant *his* printed brief is ordered filed in lieu of typewritten brief, appellant also filed a reply brief and the appellee by counsel filed an additional brief, and this case coming on to be heard was argued by J. V. Norman and John B. Baskin for appellee and Helm Bruce for appellant and submitted.

Afterwards at a Court of Appeals held as aforesaid on November 24, 1914, the following orders and judgments were entered herein, to-wit:—

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
 vs.
 OHIO VALLEY TIE COMPANY, Appellee.

Appeal from Jefferson Circuit Court, C. P. Branch #2.

The court being sufficiently advised, it seems to them there is error in the judgment herein.

It is therefore considered that said judgment be affirmed and appellee recover of appellant 10% damages on the amount of judgment superseded herein. Which is ordered to be certified to court.

It is further considered that appellee recover of appellant its herein expended.

On the same day the said Court of Appeals delivered an opinion in words and figures following, to-wit:—

(Here insert copy of opinion #2.)

455 Court of Appeals of Kentucky, November 24, 1914.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
 vs.
 OHIO VALLEY TIE COMPANY, Appellee.

Appeal from Jefferson Circuit Court, C. P. #2.

Opinion of the Court by Judge Nunn, Affirming.

This is an action by the Ohio Valley Tie Company to recover the Louisville & Nashville Railroad Company \$100,000 in damages for wilful and malicious injury to business, inflicted by withholding numerous conveniences and accommodations furnished other shippers, and by imposing extortionate freight rates and other burdens not imposed upon other shippers. It charges all of this done for the wilful and deliberate purpose not only of injuring appellee's business, but of destroying it and thereby eliminating as a competitor of the railroad company along its line for the chase of cross-ties. The jury returned a verdict against the railroad company for \$56,971.56. From the judgment on this verdict appeal is taken. The jury's verdict was itemized, that is, had specific findings, and \$50,000 was awarded for damage to plaintiff's business and credit; \$5,000 injury to ties; \$1,000 attorney fees; \$771.56 expense of transferring ties; and \$200 for

of time and services performed.

Appellant contends there is no warrant in law for the recovery of any damages, and that, in any event, the verdict is flagrantly grossly excessive.

The tie company was incorporated in 1903, with a capital

\$50,000, but it did not locate its business on the lines of appellant until 1908. In the first year of its existence it handled about 250,000 ties; its business grew every year, and in the fiscal year ending September 1st, 1911, it handled 1,300,000 ties at a profit of \$27,000, but in the fiscal year ending September 1st, 1912, its business was reduced to 1,000,000 ties, and a loss sustained of \$28,000. Therefore it had never lost money, that is, its profits, beginning with \$10,000 the first year, had gradually increased until the time of this loss in 1912. In order to understand the controversy, it should be explained that railroads maintain what is called class and commodity rates. A special rate is made to carry cheap and bulky commodities, which move in large quantities, like lumber, grain and raw ores. Higher rates are charged on other commodities in proportion to their value, cost of carriage, and liability to injury. Commodities of this kind are graded into 1, 2, 3, 4, and 5 classes, the highest charge being made for class No. 1, which includes the more valuable commodities, while the cheapest class rate is named on class No. 5, which includes such commodities as churns, chair stock, pails, pumps, farm wagons, wheel barrows, and a hundred other of that kind. The commodity rate on lumber is and was only about one-fourth of the 5th. class rate.

In 1888, in the case of *Reynolds v. Western N. Y. and Penn. Railway*, 1 I. C. C., 593, it was held that interstate rates on cross-ties ought not to exceed the rates on lumber. We take these remarks from the ruling in that case:

"It requires no argument to prove that the placing of railroad ties in the same category with these articles (5th. class) is neither reasonable nor just. The mere fact that it is so found is sufficient of itself to suggest that it was placed there for some purpose not readily apparent and different from the reasons which ordinarily influence classification. * * *"

"The ordinary conflict of interest between the railway and the shipper is here intensified by the fact that the direct interest of the carrier requires the cheapening of the shipper's product. It was candidly admitted by its general superintendent that this consideration influenced the conduct of defendant in fixing its rates upon ties at a time when its interstate rates were not subject to control under a law of Congress. But if this was legal then, it is no longer. It involved and implies extortion. It is not only repugnant to every man's sense of propriety and justice, but it is directly forbidden and made illegal by the third section of the Act to regulate commerce, in that it subjects this particular description of traffic to undue and unreasonable prejudice and disadvantage for the pecuniary benefit of the carrier itself. It is a course of dealing if possible even more obnoxious to the just provisions of the act than would be a tariff arranged in the same manner for the purpose of giving preference to another shipper competing from another direction in the same market.

Rates established by a common carrier under the influence of a desire to keep upon its line material for which the road itself has use, or to keep the price thereof low for its own advantage, cannot be

justified either in morals or in law. Every party who produces such material is entitled to sell it when he wishes in the best available market, and the common carrier has no right to prevent his doing so by disproportionate or unreasonable rates. This the defendants in the present case have been attempting to do."

In case No. 3136 Chicago Car Lumber Co. v. Louisville & Nashville —, the Kentucky Railroad Commission awarded reparation to the Chicago company for overcharges in rates the railroad had collected for carrying cross-ties as of the 5th class instead of upon the lumber or commodity rate. In that case the commission said:

"The commission has repeatedly held that the rate on ties should not exceed the rate on lumber from which they are made."

This complaint of the Chicago Lumber Company, above referred to, was of the same nature as the Reynolds complaint, supra, and there the Interstate — Commission awarded reparation to the claimant for the difference between the overcharges collected on cross-ties

at the published, fifth-class, rate and what the charges would have been if based upon the commodity rate accorded to lumber and made an order requiring the railroad company to establish and maintain, between the points which the shipments involved a rate on cross-ties not in excess of the lumber rate. Both the state and interstate commissions not only required establishment of lumber rates on cross-ties between the points named in the complaint but severely condemned the old system of classification, and held that there was no justification for charging any more than the lumber rate on cross-ties between any points. If there was room for argument that these complaints, and the rulings of the commissions thereon, were not sufficient to inform the appellant of the general policy of the Commission with reference to such classification, and the manifest iniquity of the fifth-class rate for cross-ties, the question is certainly settled beyond controversy by the Supreme Court in the case of Mitchell Coal Company v. Penn. R. R. Co., 230 U. S. 134, where it was decided that when once the Interstate Commerce Commission has condemned a rate or a practice, any other shipper may rely upon that ruling, and may bring suit without first going before the Commission. In this connection, it may be again noted that the practice of putting ties on any but the lumber rate was condemned as far back as 1888.

Until the summer of 1910, the appellant only collected for carrying cross-ties the amount of the lumber rate, although it is conceded that in its published tariff rates cross-ties were classified and listed in the fifth-class, so that nominally the rate on cross-ties was from 2 to 40 cents per cwt. while in practice it collected but 8 or 10 cents per cwt., the lumber rate. Since a cross-tie weighs 20 pounds, it will be seen that application of the fifth-class rate makes the freight equal the worth of the cross-ties, and amounts to prohibition of carriage. In 1908, when appellee began business along the appellant's lines, appellant was using approximately 500,000 ties annually, and it was paying for them about 35 cents each. This price plus the lumber freight rate to Louisville was about 20 cents less than their Louisville market value.

The appellee, relying upon the rulings of the state and Federal Commerce Commission with reference to cross-tie classification, and knowing that the appellant was not applying its published rates which had been condemned, and expecting a continuance of its practice of charging only lumber rates for cross-ties, as directed by the Commission, bought quantities of timber land, and sent its buyers in the territory served by the appellant, particularly along the line of its Owensboro and Nashville division, and began to make and purchase thousands of cross-ties.

Until the summer of 1910, the business of appellee in appellant's territory was carried on without annoyance, or interference and it was making satisfactory profits. It entered into and was filling large contracts with the Pennsylvania, Nickle Plate, and the Big Four railroad companies. Ties for these contracts were shipped over the L. & N. billed to out of state destinations, and at Louisville were delivered by the L. & N. to these contracting carriers. During the summer of 1910, and without any warning to the appellee, the appellant began to apply its published tariffs, that is, freight-rates were charged as if ties were embraced in the fifth-class. The first notice the appellee had of this change was receipt by mail of debit memoranda from the railroads to whom it had consigned ties. Appellant had collected from them this excessive rate which it charged for articles in the fifth-class, and these consignees began to send notice to the appellee, as each car was received, that they had been compelled to pay the excess rate, and requesting credit for the difference on the books of appellee. About the same time, the appellee began to receive written requests from appellant to remit to it, and make good the amount of what it claimed was the undercharge they had been making for carrying cross-ties during the years past. In other words, appellant claimed that since it had been carrying ties on lumber rates in the face of its published tariff specifying a rate for cross-ties as of the fifth-class, it desired a remittance to cover the difference.

On July 29th, 1910, appellee addressed a letter to appellant in which it agreed to make remittance on condition that appellant would sign such a stipulation that could be brought to the attention of the Interstate Commerce Commission, and a ruling obtained on the authority of appellant to maintain or charge such excessive rates. To this letter, no reply was made, but in fulfillment of its contracts, appellee continued to ship to the railroads named, notwithstanding the ruinous rates, and very soon it had consigned 91 carloads upon which appellant collected and retained \$3,260 in freight charges over and above the lumber rate. This change in the policy of appellant affected only interstate shipments. In other words, these excess charges were applied only on cars consigned to points outside of Kentucky. In seeking a way to evade the embargo thus laid upon its business, the appellee remembered that the Big Four and the Pennsylvania lines enter Kentucky at Louisville. Except such tracks as they have in Louisville, their systems are located outside of Kentucky, and all the ties that had been purchased by them were used and consigned to points in other states. The

Nickle Plate had no track in Kentucky, and appellee was forced to give up that contract entirely, but as to the Pennsylvania and Big Four it hit upon the plan of consigning the cars to them at Louisville. Almost immediately after this method was attempted, the appellant began to apply the class rate on these shipments to Louisville, and very soon it had collected on 89 cars so consigned \$8,100 more than the rate would have been for lumber, or than it had theretofore been collecting on cross-ties shipped between points within the state. Matters continued this way until the summer of 1911, when the appellant refused to deliver cars at Louisville consigned to the railroads, they having refused to pay the fifth-class rate. A suit was filed in the Jefferson Circuit for a mandatory injunction requiring delivery of the cars on payment of the lumber rate, and to recover the \$8,100 excess charges theretofore collected on the intra-state shipments. Appellant resisted the action on the ground that the purchasing carriers never intended to use them in Kentucky, and that though consigned to these carriers for delivery in Kentucky, the true purpose was re-carriage to a destination along their line outside of the State. The ties were, therefore, matters of interstate commerce, as it contended. In the lower court, the prayer of the appellee was granted, and judgment was given in its favor for the overcharge, \$8,100. The case was appealed to this court, *1 N. v. Ohio Valley Tie Co.*, 148 Ky., 718, and the judgment was affirmed.

We there held the ultimate destination was not the controlling feature in determining whether the shipments were interstate or intra-state:

"As the contracts of shipment provide for transportation from points within the state to Louisville, another point within the State, it was entitled under its contract to the intra-state rate, a right with no purpose or subsequent conduct on the part of the purchasing carrier could in any way affect."

A writ of error was taken to the Supreme Court of the United States but abandoned and the judgment paid before answering the case at bar.

When the case was decided by this court, and for the purpose of hindering the shipment of cross-ties off its lines, the appellant refused to furnish cars. Appellee would request cars for certain points and dates, and have its employees ready for work, and purchasing inspectors ready to take them up, only to find that an insufficient number, if in fact any cars had been furnished. The proof showed

464 that adequate number of cars and shipping accommodations and facilities were afforded all other shippers for every class and commodity. To avoid this practice, the appellee secured authority from the Pennsylvania and Big Four to tender, and to tender to appellant the cars of those roads, and this offer was refused. Such of its own cars as appellant did supply were not permitted to be carried off its lines, and when they reached Louisville, appellee was compelled to transfer them from cars on appellant's sidings to empty cars on nearby sidings of the Pennsylvania and Big Four. Notwithstanding this handicap, and extra expense

pellee continued its endeavor to fulfill its contracts with the roads named. Seeing that its efforts to thwart shipments of appellee were failing, appellant then, September 29th, 1911, issued an order to all of its agents that they should not accept for shipment any further cars of ties for the appellee when consigned in care of those railroads and their "deliveries", and the agents were directed to follow the instructions to the letter. In fact, acceptance of cars was limited to consignment direct to the appellee, or to the Penn-

sylvania, or Big Four, Monon, or B. & O. railroads, not their
465 "deliveries." Observing that the Louisville Street Railway

Company was not included within the list of favored consignees, if such they may be called, the president of the tie company went to see appellant's officials to inquire the meaning of this order, and was informed that ties shipped to any of those named in the favored class would be delivered to the "team tracks". These "team tracks" are in a part of the City remote from sidings of the railroads above named, and the result was that if any shipments were made, ties must be hauled or carted from appellant's "team tracks" across the City to the cars of the railroads named. This made further shipments impracticable, if not impossible.

Fifteen days before the issue of this order, the appellee had filed with the Interstate Commerce Commission at Washington, a complaint against appellant in which it asked that appellant be required to establish the lumber rate on cross-ties and sought reparation for the overcharge, \$6,200, collected on the 91 cars before referred to. After appellant issued the order limiting tie consignment to its "team tracks", no further shipments were attempted. It had already been denied the privilege of shipping to the Nickel Plate. By the circular no facilities at all were offered for shipping to the Louisville Street Railway. In fact, the only purchaser or consumer left to the tie company was the L. & N. Railroad. With its business thus circumscribed, if not destroyed, it filed this suit
466 in December 1911, seeking to recover for the loss to its business and credit sustained by reason of all this wilful and malicious conduct of appellant.

As to the form and sufficiency of the petition it may be conceded that while it is made up of numerous separate causes of action, that is, each act of appellant above named would give ground for recovery of special damages, that fact will not make a misjoinder when damages are sought for the greater wrong and injury, loss and destruction of business and credit which all of these separate acts have brought about.

In *Boyce v. Odell Commission Company*, 107 Fed., Rep., 58, the court said:

"A series of wrongful acts all aiming at a single result and contributing to the injury complained of, to-wit, the destruction of one's business, credit and reputation may be counted on collectively, as producing the result in an action on the case."

In *Jones v. Morrison*, 16 N. W. 854, several distinct acts and transactions were averred to show one common purpose and the court said.

"If these several acts were separate and independent transactions with no connection between them, they could not be joined in the same complaint. But the general subject affected by the various acts is the same, to-wit, the rights and interests of plaintiff as a stockholder in the corporation. The complaint alleges a plan or scheme—a conspiracy—by Dorilus and Clinton Morris to cheat and defraud him in respect to his rights and interests, and that the specific acts charged were done to carry out the scheme into effect. If this were so, they were part and parcel of each specific act as much so as any other. The object of the action is to protect plaintiff's rights and interest as a stockholder in the corporation from the invasion contemplated by the conspiracy, and undo what has been done pursuant to it, so that his rights and interests shall remain as though the conspiracy had not been attempted. It is immaterial that the acts differ in their particular character, that they were done at different times, and that the defendants do not all claim to be interested in, or benefited by, or of them, or in the same degree in any one of them."

In *Standard Oil Company v. Doyle*, 118 Ky., 662, which was an action to recover damages for an unlawful injury to business, the court held the petition was good, which described the greater or less by setting up the different acts which constituted it in the following language:

"By wanton and malicious interference with plaintiff's business and the conduct thereof in obstructing, harassing and annoying plaintiff's servants and employees while engaged in the discharge of their respective duties in selling and distributing oils, etc., to plaintiff's customers and patrons, and by wilfully enticing, persuading and otherwise influencing such servants and employees to leave plaintiff's employ against the will and consent of plaintiff; by threatening certain wholesale customers of plaintiff to shut them up in their business if they continued to purchase and deal in plaintiff's oils, etc., and by threatening both wholesale and retail customers of plaintiff, that it (the Standard Oil Company, aforesaid) would refuse to sell them oil, gasoline, and other commodities dealt in by said defendant as long as they continued to purchase such articles, or any of them, from plaintiff; by causing and procuring false and injurious reports concerning plaintiff's business to be circulated in and about the city of Lexington and published in certain of the daily newspapers of the city, causing and procuring plaintiff to be arrested on various charges of violating the ordinances of said city, and the criminal and civil laws of the city of Lexington and Commonwealth of Kentucky, to be prosecuted therefor; and by divers and sundry wrongs to estrange and alienate the acquaintances, customers, and patrons of the plaintiff, to ruin, oppress, and impoverish the plaintiff, and drive him out of the business of constructing for the sale of gasoline, etc."

In the case at bar every act referred to was established by the controversy, that is, they were not denied, and there was a substantial admission that the purpose was to prevent or hinder the

ment of cross-ties off its road, and this, of course, meant the elimination of appellee as a competitor, and the destruction of its business. Appellant seeks to shift the blame for these drastic and arbitrary orders, and its refusal to furnish to appellee the same accommodations and facilities it was furnishing to other shippers of other commodities, by saying it was necessary to do so in order to circumvent appellee in the various steps which it was taking to avoid these orders and escape the effect of appellant's rules and regulations. But when it is remembered that these orders and rules and regulations were aimed at appellee alone, and to thwart it in the business which it had a perfect right to carry on, it becomes apparent that appellee was only exercising in a lawful manner its right of self defense against the death blows, time and time again directed at it by appellant. Its right to every privilege and facility for shipment which it requested is recognized and established by law, and they were at the time being afforded to all shippers of other commodities.

As to the complaint that the verdict is excessive, it is directed at the \$50,000 for injury to business and credit, and \$5,000 damages to cross-ties, and we may say again, that before we are authorized to reverse for that reason the damages must be so excessive as to strike one at first blush as being the result of passion and prejudice. Appellant argues that the only damage proven to business and credit is the overcharge on the 89 cars of interstate and the 91 cars of intra-state shipments, and having paid that damage there is no proof to sustain the verdict of \$50,000. At the time of the trial, the overcharge recovered in the state court on the 91 cars had not been paid. There was no plea of payment as to either, for, in fact, this action was not brought to recover such overcharge, and the court expressly instructed the jury that they should not consider or permit the same to enter into any amount of damage which they might award, and at the conclusion of all the evidence, all testimony with reference to cars shipped between points within the state was withdrawn from their consideration. But appellant says that although the jury were so instructed yet, in proof of the malicious and deliberate purpose to destroy appellee's business, evidence of all the acts to hinder the business, including overcharge on these cars, was heard by the jury, and, in the assessment of general damage, it is inconceivable that the jury was influenced by this proof of special damages, and that the verdict was not enhanced by reason of it. But, even if the proof in that regard was incompetent, its admission is not reversible error, because it was not objected to. Appellant says it did not object to the testimony, because it did not then know how the court would instruct the jury with reference to it. But the practice for testing, a ruling of the court, or the competency of evidence, is to object and except at the time. In considering the extent of damage it will be well to recall that these wrongful practices of appellant began in the year 1910, and culminated during appellee's fiscal year beginning September 1st, 1911. It was during that year it sustained the loss of \$28,000. The year before it had a profit of \$27,000. Measured

by its past experience of gradually increasing profits, we are unable to see why it is not a fair conclusion that but for the embargo laid on its business, its profits for 1912, would have been at least as much as the year before. Transform a \$27,000 profit into a \$28,000 loss and a damage is shown in excess of that found by the jury. From the evidence it appears that appellee turned over its capital twice a year and, with its good credit, it was able to borrow freely, and this borrowed capital was likewise turned over as often. It is shown that one bank in Louisville, when it heard of the fight appellant was making, called one \$40,000 loan. For at least two years appellee was deprived of profit from this borrowed capital by the injury to its credit, and was also deprived of more than \$12,000 of its invested capital, by way of the excessive freight charges withheld by appellant: and it is hard to estimate how much longer will be the

period that appellee will suffer from the injury to its credit and how much time it will require to regain its customers.

472 While it may be hard to estimate the length of time this loss of business and injury to credit will continue, yet the fact of loss in this way is not at all uncertain. The jury had a right to take these things into consideration, and to conclude that simple interest would be poor compensation for capital thus tied up and credit so injured. In the face of a wrong so persistent and aggressive practiced for a purpose without justification in law or morals, it is not the policy of courts to draw close distinctions in order to determine with unerring accuracy whether in all the damages, which certainly were sustained, some were not too remote for recovery. But the damages referred to above are not remote, and they are such as naturally flow and were in contemplation of the party guilty of the wrong.

In *Gregory v. Slaughter*, 124 Ky. 345, an action for tort for negligence merely, this court asks the question, "If there is uncertainty ought not the doubt be resolved in favor of the innocent and not the guilty."

As said in the Case of *Gildersleeve v. Overstolz*, 90 Mo. App., 518:

"In the case at hand the defendant's conduct was so lawless and malicious that on that ground alone he might properly be held responsible for damages more indefinite than in ordinary instances where evidence of malice and oppression were lacking."

473 In *Kentucky Heating Co. v. Hood*, 133 Ky. 383, the court held that a gas company, whose employes wrongfully severed the connections by which a rival company was supplying gas to heat a house, in which rooms were let to boarders, was liable for damages not only for the cost of replacing the connections, but also for reasonable compensation for the loss sustained by the removal of tenants, and also for personal inconveniences and discomfort although no wrong was intended.

The court said:

"It would fall short of the relief to which appellee was entitled to limit her recovery to the money she was required to pay out to have the injury repaired. A person can not either negligently or wantonly injure the property of another, thereby causing the other

to suffer loss in business or profits, or in the denial of the ordinary and reasonable comforts he enjoyed, and then assert that all the injured party is entitled to receive is the cost of replacing the injured property. Waiving, for the moment, the question of exemplary damages, we may lay it down that, whenever a person is injured in his person or property by the wrongful acts of another, he is entitled to recover such a sum as will fairly compensate him, not only for the actual loss sustained but for such consequential damages as may spring from the deprivation of business or profits as
474 are the direct or proximate result of the tort complained of, if such consequential damages are capable of reasonable ascertainment; and in addition thereto, the facts justifying it, compensation for personal inconvenience and discomfort."

In *Allison v. Chandler*, 11 Mich., 542 (551), which is also cited with approval in *Gregory v. Slaughter*, *supra*, the court said:

"It has been frequently said that the rule of damages where there is no fraud, wilful negligence, malicious oppression, etc., is the same in actions of tort as in those upon the contract. But though the remark is doubtless true in its application to those cases of tort where, from the nature of the case elements of certainty exist, by which substantial compensation may be readily estimated, and other cases which are but nominally in tort, we do not think it can be accepted as a principle of universal application; or, in our opinion, can it be justly applied to any case of actually aggressive tort where from the nature and circumstances of the case itself no such elements of certainty are found to exist or none which apply substantially to the whole case."

475 Appellee's damage is of a continuing nature. When one's credit is injured, and his customers are lost because of contracts broken, and his competitors are enabled to take his place, it is harder to win back their favor, and reestablish himself in the business world than it was to start in the first place. From one lost customer alone, the *Nickle Plate*, appellee had an annual profit of from \$5,000 to \$8,000. As was testified to by Mr. Bush, president of appellee. "The *Nickle Plate* railroad goes through a section of country where there are a large number of industries and manufacturing concerns, and those concerns with their various switches use a low grade of ties, and they made a market for ties which the Big Four and the Pennsylvania would not use for their regular tracks, and enabled us to get rid of all kinds of ties that we made or bought."

In a business like appellee's, many ties of this character accumulate, and by being deprived of the privilege of shipping them over the *Nickle Plate* lines, it lost a market for such ties, and this loss was not only a present damage but likely to continue for years. In other words, it is short of the truth to say that appellee's loss of business, and loss of its place in the business world are restored merely by reestablishing a proper cross-tie rate, or by again offering fair facilities for shipping, or by a repayment of its capital which was wrongfully withheld.

476 But appellant argues that this \$50,000 verdict, necessarily includes the \$12,000 of excessive freight charges, which appel-

lee was seeking to recover by other suits, although part of these overcharges were paid back before the trial, and the remainder have been paid since. We do not believe the record justifies the conclusion that these excess charges were included by the jury in the damages awarded. When the testimony was given as to the \$28,000 loss for 1911 and 1912, fiscal year, only one action was pending, and that, which originated in the state court, was on appeal to the United States Supreme Court. The fact that an action was pending is proof to show that the amount involved was carried on the books as assets. Entertaining this hope of collecting the claims, in view of all former rulings of the State and interstate Commerce Commissions, is it reasonable to believe that they had been charged off as a loss? Appellant made no effort by cross-examination or otherwise to controvert or impeach the positive testimony as to this \$28,000 loss, and when there is absolutely no proof to the contrary, the jury were certainly warranted in accepting the statement as true.

Although permitted, the jury did not award punitive damages. Although permitted to take into consideration the continuing nature of the injury, and allow compensation for more than the loss actually sustained during the fiscal year 1911-'12, it does not necessarily follow, that they did so, because the amount allowed is not as much as the loss sustained in that year.

477 As to the \$5,000 allowed as damage to cross-ties, appellee's president is the only witness to testify. He swears the loss was \$10,000. From his evidence, it appears that in the summer of 1911, appellee had over 20,000 ties on appellant's track, ready for shipment, and these were damaged 50¢ each, by exposure to the weather due to delay in shipment; that in six months a tie will speck and be so damaged as to be rated as a "cull," and that when this suit was tried, about eighteen months afterwards, most of them were still on the track. But appellant says, this delay was not so much due to its failure to furnish cars to move the ties as it was to appellee's failure to get a customer for them. It proves that a short while before the trial, it called upon appellee to ship them and get them off the right-of-way, and that appellee responded that it had succeeded in getting a customer and would endeavor to move them without delay. But it failed to do either. When the proof in the whole case shows very clearly that the necessity to get a customer was forced by the loss of those it had, and that they were lost by reason of appellant's wrongful acts, it should not now be permitted to urge, by way of defense or extenuation, the result of those wrongful acts.

The appellant next offers as a bar to the prosecution of this action, the fact that appellee elected to go to the Interstate Commerce Commission with complaint of unreasonable rates, and asked damages on that account. It argues that to permit appellee to recover other or additional damages growing out of or incidental to the acts complained of will be a direct violation of the Interstate Commerce Act. To support its contention, it relies upon Section 9 of the Act.

"SECTION 9. That any person or persons, claiming to be damaged

any common carrier subject to the provisions of this Act, may either make complaint to the Commission, as hereinafter provided, or may bring suit, in his or their own behalf, for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any District or Circuit Court of the United States of competent jurisdiction; but such person or persons, shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

We do not believe this position is tenable for three reasons: (1) this objection should come by way of a plea in abatement, and, (2) the Interstate Commerce Commission as to damages is not a court, and its finding in that regard is evidently merely—neither binding or conclusive; and (3) The instructions of the court prevent allowance of anything for excess freight or any damage by reason of the act of charging excess freights.

The answer does not refer to the pending complaint before the Commission. But appellant argues that the question is raised on its demurrer, for the petition, as it says, shows that the action was then pending between the same parties and that they were the same causes of action.

If the petition does not show the ground of abatement, then, of course, a demurrer will not raise the question. In such cases, if defendant desires to rely upon it, it must be affirmatively pleaded, otherwise the answer will be deemed a waiver. To see if the petition shows the state of facts relied on by appellant to abate the action, we measure it by Newman on Pleading and Practice, Section 392b.

"In order to abate an action by reason of the pendency of another suit, the two actions must not only be pending at the same time and prosecuted at the time the objection is made, and both be pending between the same parties, but they must both be prosecuted for identically the same cause of action."

The petition, in recounting the numerous wrongs, inflicted upon by appellant in furtherance of its malicious purpose to destroy appellee's business, avers among others that it had been forced to employ attorneys and institute actions, and that there was then pending in the state courts suit for mandamus and recovery of freight overcharge on the 91 cars, and a complaint before the Interstate Commerce Commission against the unreasonableness of the published freight-rates, and for reparation of the overcharge on 89 cars. Manifestly the action in the state court, and the complaint before the Commission were of a special nature, seeking special relief not obtainable elsewhere or otherwise. But this action is to recover general damages as a result of numerous wrongful acts, and although the overcharges which form the basis of the special suit and the complaint above referred to, are among the many wrongs alleged in the petition, we can not see how judgment or proceedings in the special actions should operate as a bar to the prosecution of this, or the fact that they were then pending, could serve to abate it. Although they were between the same parties, the causes of action were not identical.

The case in the state court was for a mandatory injunction to compel the appellant to carry and deliver cars to the Pennsylvania and Big Four in Louisville, as being intra-state shipments, and to recover the excess charges it had collected on 91 cars theretofore shipped under the same conditions. It was an action in equity and to recover special or incidental damages. While this is an action at law, to recover all the other damages, sustained over a longer period of time, which resulted from that and many other wrongful acts.

481 In *Walker v. Mitchell*, 18 B. Mon. 541, the lower court held that the plaintiff having, in an action to recover land, elected to sue also for damages for the detention of the land, was precluded by the judgment in that case from subsequently recovering damages of any kind for the detention of the land which might have been recovered under the allegations of his pleadings in this case.

But this court said:

"But in this case the plaintiff claimed in her petition a right to recover for the extraordinary expenses incurred in her action for the recovery of the land, and as these expenses could not well have been recovered in that action, and were not set up or embraced in the petition in terms, or by any fair or reasonable construction, she could not, as to those expenses, have been barred by the former recovery. It results, therefore, that the court below erred in giving judgment in bar of the claim to recover the reasonable fees she had paid, or was bound to pay, to counsel for services in and about the recovery of the land; but as to all else besides this claim the judgment was correct."

The case of *Crockett v. Miller*, 112 Fed. 729, was an action to recover against a sheriff damages for wilfully and maliciously levying an execution upon plaintiff's property with intent to destroy her business credit and standing. Defendant plead in bar of judgment in a former action between the same parties in which the plaintiff recovered the property wrongfully seized, with statutory damages for the unlawful detention. The court said:

"As a result of a careful examination of many cases, not only those to which our attention is called by defendants' counsel, but many others to which we have given critical attention, we think the rule may be safely stated as follows: That the only damages which can be recovered by a plaintiff in an action of replevin under the statute of Nebraska as construed by the Supreme Court of that State, when the property has been delivered to the plaintiff, are interest on the value of the property during the time plaintiff is deprived of its possession, the injury or damage done thereto by the officer in taking the same and while in possession thereof, and, in some cases, the usable value or the value of the use of the property while so detained. This we believe to be the New York doctrine, and is substantially the doctrine of the State of Nebraska, as we understand the decision."

"Accordingly it follows that the collateral or consequential damages occasioned by a seizure of property by the officer against whom the replevin suit is brought, such as injury to the business reputation, credit, and standing of the plaintiff occasioned by the malicious

conduct of the officer making the seizure, coupled with the express purpose and intention of so injuring the plaintiff, are not within the purview of the statutory damages flowing from the unlawful detention of property within the meaning of replevin acts. They are totally different from them in that they do not flow proximately from the act of detention merely, but are special and consequential damages, arising out of facts specially pleaded in this case showing an intention to inflict them.

"It is more obvious that the other element of damages, namely, the attorney's fees and expenses of the plaintiff in asserting her claim and defending her title to the property seized by the sheriff, could not have been introduced into the replevin suit. It was for service rendered and expenses incurred in that suit that the plaintiff was damaged, and, in the absence of some statutory provision permitting recovery therefor in the suit itself, it is obvious that if the necessary prerequisite element of malice existed she was required to institute another and different suit therefor. The trial court limited plaintiff's right of recovery in this action to such damages as she might have sustained by reason of loss of business credit and by reason of expenses incurred in the prosecution of the replevin suit, carefully withdrawing from the jury any consideration of damages occasioned by reason of the detention itself of the property. There was no exception taken to the court's direction with respect to damages. In other words, it was conceded at the trial that, if plaintiff was entitled to recover at all, she was entitled to recover the two items last alluded to. For the foregoing reasons, the defendants' contention that the claim asserted in this action is *res adjudicata* can not prevail.

"For like reasons, also, there is, in our opinion, no merit in the theory of estoppel, by splitting the cause of action, as argued by defendants' counsel. If the damages resulting to plaintiff's business standing and credit, as a consequence of the malicious conduct of the sheriff, could not have been recovered in the replevin suit, surely the plaintiff should not be punished for not attempting to do so."

As above stated, the action in the State Court was in equity, and to secure extraordinary relief in the way of shipping facilities and to recover special damages. At that time appellant's malignant purpose was not apparent, and the greater damage in the way of a destroyed business had not been sustained.

The same is true of the complaint filed with the Interstate Commerce Commission for damages due to violation of that statute. Moreover, the state courts retain their common law jurisdiction, and this action is purely of that character, and no attempt is therein made to recover any statutory damage allowed by the Federal Commerce Act. The court, by instructions, expressly forbade such recovery. The complaint before the Commission was as to only one species of wrong, viz: Overcharge on interstate shipments and, as a result, the Commission awarded, or recommended the repayment to appellee of the difference between the lumber and the class rates.

In order to get relief from the unreasonable interstate rate, and

have a reasonable one established, the initial step must be taken with the Commission. Its jurisdiction in that respect is exclusive and naturally the appellee went there to invoke it. If in condemning the rate, the Commission recommended reparation of the overcharge, whether requested or not, certainly that fact can not be urged against the prosecution of this action, when there is no attempt to recover the same damage. The basis of this action is a series of wrongful acts, each repeated many times, and all of them to go to produce one result, and the damage from that one result is this cause of action which is almost entirely beyond the cognizance of the Interstate Commission. By way of damage relief, the Commerce Commission has but little power. The only binding and effectual order if made in this case was in the establishment of a reasonable rate. Its award of damages, as before stated, amounted merely to a recommendation, and its value to appellee, in the event appellant refused to be governed by the recommendation, was only as *prima facie* evidence,

which it might use to support a cause of action. Its order 486 as to reasonableness of a rate are conclusive, and when once the principle of a rate or classification of a commodity has been approved or condemned by the Commission, it is given general application, and any shipper who has been or may be affected may take advantage of the ruling and seek reparation. He may seek the reparation either before the Commission or before the court, but before the Commission, the only relief it can afford is a recommendation, for it can not compel payment. Its order in this respect is only *prima facie* correct. *Mitchell Coal Co. v. Penn. R. Co.*, 238 U. S. 247. As the fifth-class rate on cross-ties had been condemned years before, the practice of appellant in maintaining it and charging under it constituted one, but only one, of the acts complained of to show that appellant's practice was wilful and malicious, and with intent to injure plaintiff's business. While in this case, no attempt was made to recover the excess freight collected, it was competent and proper to allege and prove those acts along with the many others to establish the motive actuating the practice of appellant with reference to appellee's business.

In our opinion, the fact that the Interstate Commerce Commission may have recommended the payment of special damage which flows from violation of a Federal law is no reason why the state court may not take cognizance of a suit based in part upon another result of that act which, when connected with many other acts of 487 different nature, will show a wilful and malicious purpose, and give rise to this common law cause of action.

Perceiving no reason why the judgment of the lower court should be reversed, it is affirmed.

Helm Bruce, Louisville, Ky.; Bruce & Bullitt, Louisville, Ky., & Appellant.

Edward W. Hines, Washington, D. C.; John Bryce Baskin, Louisville; J. Van Norman, Louisville, for Appellee.

[Endorsed:] Nov. 24, '14. L. & N. v. Ohio Valley Tie Co.

488 Afterwards at a Court of Appeals held as aforesaid on January 4, 1915, the following order was entered herein, to-wit:—

L. & N. R. R. Co.
vs.
OHIO VALLEY TIE COMPANY.

Jefferson.

Came the appellant by counsel and on its motion the petition for rehearing filed in this case in the Clerk's office in vacation is now noted of record and appellant further moved the court to grant a rehearing, which motion is submitted.

The following is the Petition for Rehearing filed by the foregoing order:

489 Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
versus
OHIO VALLEY TIE COMPANY, Appellee.

Petition for Rehearing.

The natural inclination is to begin a petition for rehearing with an apology. Yet the law itself recognizes that the court may be mistaken about something, either of law or fact, and therefore provides that in a civil case the judgment shall not become final until the expiration of thirty days, within which time the parties may again direct the court's attention to matters about which they think it has missed the truth.

The opinion in this case (161 Ky. 212) shows that the court has given it much attention, but, while the record is not unduly large, there are many details which it is very difficult to get straight, and which it is absolutely essential should be understood in their bearing on the vague charge that plaintiff's business has been damaged and the amount of such damage. And what we shall try to do in this petition is to get these matters straight, and to present them to the court as clearly as possible.

490 The Code recognizes that juries are sometimes carried away by passion or prejudice—not simply prejudice, but passion; and passion may be anger or it may be sympathy, or it may be both. It is very human. None of us are exempt from it, and it is nothing to be ashamed of. But we all recognize that by a reason is sometimes misled and facts distorted, and that very often a first wrong is followed by another, passing under the name and guise of reparation, or punishment for the first.

We believe that has occurred in this case. The jury evidently believed that the course of the railroad company in the matter of the transportation of cross-ties was very wrong, and as compensation

for this they have given a verdict which it is impossible to sustain upon this record when correctly and clearly understood, a verdict which, after compensation has been made for all the specific items of damage that could be thought of, gives \$50,000 additional on an extremely general and indefinite claim of damage to business. This is given, not as punitive damages, concerning which a jury has very large discretion—punitive damages being negated by the jury in this case—but as compensation, which must be supported by testimony.

We ask the court to consider the following statement of facts, reported as to each fact by a reference to the record.

The Ohio Valley Tin Company was organized in 1903 (Trans., 4).

But it did not begin to do business along the line of the Louisville & Nashville Railroad Company until in 1904 (Trans., 8).

While it has had trouble with the Louisville & Nashville as to operations along some parts of these lines, yet in connection with operations along other parts of the L. & N. line it has had no trouble at all. Thus on these lines in the great tin sections of Eastern Kentucky there has been no trouble whatever. Mr. Bush (president and chief witness of plaintiff) in connection with a friendly spirited letter of December 20, 1911, to his company from Mr. Phelps, superintendent of transportation of the L. & N. in furnishing cars, says: "This, of course, applies to Eastern Kentucky territory, where we have had no controversy with the L. & N. (Trans., 128.) The only trouble was in Southern or Southwest Kentucky (Trans., 130). Mr. Bush was able to separate the amount of business done in territory where the trouble was, from the amount of the business; and some facts drawn from different parts of the record in this connection are very striking, as bearing upon the question of what part this trouble played in the general business of the Ohio Valley Tin Company. Referring to his company's rates "on that part of the L. & N. on which the fifth class rate" (high rate) "was afterwards set," Mr. Bush states the business years as follows:

September 1, 1908, to September 1, 1909.....	64,000
September 1, 1909, to September 1, 1910.....	188,000
September 1, 1910, to September 1, 1911.....	245,000
September 1, 1911, to September 1, 1912.....	172,000

(Trans., 21, 22.)

And attention is called by plaintiff to the fact that the record shows a falling off in the last year from the preceding year of 72,000 (incorrectly written in the transcript 78,000) tons in the territory where the trouble was. But it must be remembered that in the same year there was a falling off in the company's business in territory on the L. & N. and elsewhere, where there was no trouble about getting cars, and where both rates and service were satisfactory. While the business fell off 72,000 tons in the territory which complaint is made, it fell off that year 227,000 tons in territory where there was no trouble. Mr. Bush says the com-

total business for the year September, 1910, to September, 1911, was 1,300,000 ties and for the year September, 1911, to September, 1912, was "slightly under 1,000,000 ties" (Trans., 5), a falling off in all of 300,000 ties; so that if the business fell of 73,000 ties in territory where he could not get cars, it fell off at the same time 227,000 ties in territory where there was no trouble whatever either in getting cars or in the rates.

Another fact is very significant. The business done in that territory where the trouble existed as to getting cars and with high rates was but a small part of the company's total business. From the figures already given it is seen that in the fat year of 1910-1911, when a total business of 1,300,000 ties was done, only 245,000 ties, or only $18 + \%$ of the total came from the territory in question. And in the next year, the alleged lean year, out of a total business of 1,000,000 ties only 172,000, or $17 + \%$ of the total came from the territory affected by the complaint. And it is simply inconceivable how a trouble which affected so small a portion of the total business could have had so tremendous an effect as is attributed to it, converting a profit of \$27,000 on the entire business in one year into a loss of \$28,000 on the entire business in the next year.

Again, while it is true the business done by this company in the year 1911-1912 was not as large as in the preceding year, being only 1,000,000 ties as against 1,300,000, yet it was in fact a normal average year's business; for the petition itself (written in December, 1911, before plaintiff knew what the result for the year ending September 1, 1912, was to be) says that "plaintiff has built up a large and lucrative business handling approximately one million cross-ties each year" (Rec., 3). And that is what they handled during the year in question, "slightly under 1,000,000 ties" (Trans., 5). It is therefore indisputably—admittedly—true that nothing, neither refusal to furnish cars, nor high rates, nor anything else, kept plaintiff from doing a normal average year's business in the year in question, and that of this business only $17 + \%$ came from the territory where any trouble existed.

If then plaintiff did a normal amount of business that year—if nothing kept it from doing that—then the only question is as to the profit or loss on the business thus done.

It is said the cost of transportation on a small part of the business thus done—about 17% of it—was excessive, thus increasing the expense. But that excessive charge has been paid back with interest.

Again it is said that the delay in furnishing cars for 17% of this business caused certain ties to spoil or deteriorate on the ground. But the jury has allowed for that separately (\$5,000.00).

Again it is said the refusal to send cars through to destination, and requiring a transfer of ties from car to car at Louisville, made an extra expense. But that only amounted, at plaintiff's own figures, to \$771.56 for the cost of transfer plus \$200 for the time of an officer in supervising the work (Trans., 152). And the jury has separately allowed both of those items.

been predicated on permanent loss of business, cutting off prospective profits in the future.

To this suggestion there are several answers. Such damages are (1) neither alleged in the petition; (2) nor proved by the evidence; (3) nor allowed by the circuit court's instructions; (4) and could not properly have been allowed, as there is no basis upon which they could be computed and they would be too speculative and remote.

1. There is no allegation of loss of business in the petition. The court may read the original and the two amended petitions from beginning to end, and it will find no such allegation, although there are a great many detailed allegations specifying how plaintiff has been damaged; and this court has held in countless cases that where a plaintiff specifies his damages he will be confined to his specifications.

497 The only reference to possible loss of custom is in the original petition where the allegation simply is that defendant's requiring plaintiff to transfer ties from car to car in Louisville is annoying and "tends to and was intended to drive away plaintiff's customers" and that if such practice is continued plaintiff's customers will either buy from someone else, or plaintiff will be compelled to deliver at other points than Louisville (Rec., 16). But there is no allegation that plaintiff has in fact lost a single customer. Then although plaintiff filed two amended petitions, one as late as October, 1912, nearly a year after the filing of the original petition, there is still no allegation that a single customer has been lost.

In *L. & N. R. Co. v. Reynolds*, 71 S. W. 516; 24 K. L. R. 1402, a judgment for plaintiff was reversed because evidence had been admitted as to the value of time actually lost, because there was no sufficient allegation in the petition of this special damage.

2. There is no proof of permanent loss of business, certainly not any of important magnitude. The only approach to this is in case of the Nickel Plate Railroad; and of this much is said in argument and in the opinion.

Let us see what that amounts to, if true. In plaintiff's greatest year, 1910-11, its shipments to the Nickel Plate amounted to 105,000 ties (Trans., 92). But plaintiff's total shipments that year amounted, as we have seen, to 1,300,000 ties (Trans., 5). Therefore the Nickel Plate business amounted to only eight per cent (8%) of the total business.

498 It is true Mr. Bush says he lost the business of the Nickel Plate (Trans., 93). But this must be read in connection with his other statement, in which, speaking of a certain circular issued by the L. & N., he says: "It stopped us shipping ties to the Nickel Plate Railroad unless we paid the high rate." (Trans., 91.) But now that the rates have been reduced Mr. Bush does not say that he can not get any business from the Nickel Plate, if he wants it. He does not say that he has even tried to get it since the rates were reduced. And this court has repeatedly held that, even if a wrong is done, it is incumbent on the one injured thereby to do what he can to minimize his damage; and that, for example, in case of a wrongful discharge of an employe, it is the duty of the com-

plaining party to allege and prove that he has tried to get employment, but could not (*Lewis v. Scott*, 95 Ky. 484, 488). in the present case. Plaintiff does not even allege it is petition we have seen, that it has lost the Nickel Plate as a customer. fact, while plaintiff speaks in its petition of contracts with Pennsylvania Railroad and the Big Four, it never even mentions the Nickel Plate. But, waiving that, while its president says on the witness stand that it has lost the business of the Nickel Plate, he shows this was on account of a raise in rates, and he does not say, now the rates have been reduced, that he can not get back that customer or that he has even tried to do so.

The court seems to think that plaintiff's competitors have taken over this lost customer. But Mr. Bush shows this is not true. fact.

499 was frank enough on the witness stand to say that in this territory where the trouble occurred he has no competitor, he, or his company is the only one there in the tie business.

says "It ought to be fair to state that in the last two years we have been the only people shipping ties out of this territory to Louisville * * * On that part of the L. & N. south of Louisville—and south of Louisville, in which they had attempted to enter these high rates we have been practically the only competitors the L. & N. Railroad in the purchase of ties" (*Trans.*, 110, 111).

Plaintiff therefore has no competitor in this territory to pick up a lost customer, and as to any other territory it has the same opportunity it always had to ship to the Nickel Plate or any other.

3. The court's instructions did not submit to the jury any question as to what plaintiff might be damaged by loss of prospective future profits. And their verdict therefore could not be upheld on that theory, even if the pleadings and proof furnished a basis for such a recovery. (*Lynch v. Snead Architectural Iron Works*, Ky. 241.)

After instructing the jury that, if they believed defendant had done any of the various wrongs charged, they could find for it the sum of money as you believe from the evidence will reasonably compensate the plaintiff for such injuries" (*Instructions No. 1*). The court then said to the jury that by these terms "is means sum of money, if any, as the plaintiff lost by reason of any wrong done by defendant as defined in said instruction." (*Instructions*

3, *Rec.*, 126. *Appellant's Brief*, p. 17.) Money and loss—lost—not to be lost; past loss, not prospective loss; loss—not loss of mere prospective profits.

4. The court would have been absolutely unjustified by its authority in giving an instruction allowing a recovery for what the jury might think plaintiff might lose in the future in the profits. This is not the case of one whose power to earn money has been permanently destroyed or impaired, as by a physical injury. It is a mere case of suggested temporary disarrangement of business by loss of custom due to temporary conditions (assuming that any such loss), where there is no reason why the custom should come back, and where plaintiff's chief witness does not even express the opinion that it will not come back, or that he has tried to get it back.

We repeat, therefore, that it is not possible to uphold this verdict on the theory that it allows for loss of prospective future profits that might have been hereafter earned on business lost; and that when defendant has repaid with interest the excessive rates collected and has been charged with the extra cost of handling the ties in transferring from car to car and in supervising that work, and with the attorney's fees incurred in recovering the excess rates, and with the depreciation in ties delayed awaiting shipment, there is no reasonable basis for a verdict of \$50,000 in addition against defendant.

In conclusion on this general subject we call the court's attention to a fact brought out at the very close of the testimony by 501 plaintiff's cross-examination of one of defendant's witnesses, and which was not known to defendant's counsel until thus brought out. That fact is that from Sep'tember 30, 1911, when only one month of the year 1911-12 had expired, the defendant's agents on account of their construction of an order of injunction, put in force the intrastate rate, viz., the low, lumber rate on all cross-ties, even though interstate shipments. (See Dempf's cross-examination by plaintiff's counsel—Trans. 308; his examination on recall by plaintiff's counsel, Trans., 320; and his redirect examination, Trans., 321-329.) All this was brought out by plaintiff's counsel on cross-examination handing Mr. Dempf, defendant's local freight agent, bills of lading for fifty cars of ties, belonging to Ohio Valley Tie Company, which moved from points in Kentucky on the L. & N. to Shirley, Ind., between December 1, 1911, and June 30, 1912, and asking him if the receipts for charges did not show that they moved on the lumber rate (the low intrastate rate). (Trans., 308, 309.) Mr. Dempf said the bills did not show on their faces; that he would have to consult his records. He was asked to do that and said he would. He was then excused from the stand, and after lunch came back, having examined his records and gave the testimony mentioned above.

It thus appears that these rates were only charged during one month in the year 1911-12, the year when the great loss is said to have occurred. And this testimony was never contradicted. Mr.

Bush did not testify in rebuttal at all. And, in fact, as just 502 shown, the testimony was brought out by plaintiff's own counsel handing the bills of lading for 50 cars of Ohio Valley Tie Co. ties to the witness and asking him if it was not a fact that they moved on the low, lumber rate, though interstate shipments.

This witness, Mr. Dempf, testified to the low rates being put in on September 30, 1911; but said he knew nothing about the question of whether the ties went through without change of cars; that probably Mr Arbegust would know about this (Trans., 327).

Mr. Arbegust, L. & N. superintendent of terminals, was then called, or rather recalled, and he then testified that when cars of ties came to Louisville consigned to Louisville, they were unloaded and the cars returned; but when they came consigned to any point beyond Louisville, they went through without unloading, and without regard to what railroad they were going to. (Trans., 332.) And this testimony was never contradicted.

And thus it appears from this uncontradicted testimony, really brought out by plaintiff, that when only one month of the year 1911-12 had passed, that being the year of the alleged great loss of \$28,000, the low, lumber rates were put in on interstate shipments of ties and they were allowed to go through to destination without unloading, where they were consigned to a point beyond Louisville.

This makes it all the more impossible to understand where the \$50,000 damage to business in the year 1911-12 came from.

503

Double Recovery.

We believe it is inevitably and certainly true that to some extent there has been in this case a recovery for the same items of damage twice; though the court does not think the record justifies the conclusion that the excess charges in rates were included in the verdict.

Let us consider this. It is manifest that the jury, in arriving at their verdict of \$50,000 for damage to business, simply took Mr. Bush's statement that in 1910-'11, the company made a profit of \$27,000 and in 1911-'12, a loss of \$28,000 and added the two together, making \$55,000 from which they left off \$5,000, making their verdict the even figure of \$50,000. Now how did Mr. Bush arrive at the result that he "showed a loss of \$28,000" in 1911-'12? It is to be presumed that he credited the business for that year with its earnings and charged it with its expenses. Among the expenses of that year were the \$8,012 of excess charges which plaintiff sued for in the State court, and which were finally paid back while the case was in the Supreme Court (see our original brief, pages 38 and 39 for details). And the same is true of an additional sum of \$4,000 of excess charges which were not involved either in the State court suit nor the proceeding before the Commission. (See Brief, p. 39 for details.) It is admitted, as of course it must be, that these items were expenses paid that year, and must have been charged as part of the operating expenses of the year. But the court says an

504 the court, "The fact that an action was pending is proof to show that the amount involved was carried on the books as assets." In other words, the argument is that, because the claim to recover this excess was in suit, it must be presumed it was entered on the books as an asset, which would thus balance the charge of the expense.

If that argument were sound, and the books were kept in that way, crediting as an asset any claim that was in suit, they would not have showed any loss at all; because this very suit we are now trying was then pending, in which plaintiff is claiming \$100,000, which includes all claims for damages to business; and manifestly if that claim had been credited on the books as an asset, the books would have showed no loss.

Manifestly the books were not kept that way. They were kept to show the actual earnings and actual expenses, without crediting disputed claims involved in law suits as assets.

But if it be argued that plaintiff may have carried that particular

claim for recovery of the excess charges as an asset, because of its great confidence in recovering same, then how about the claims in this very pending suit, that the jury allowed specially? Take the claim for \$10,000 for damages to cross-ties, for example. It is true the jury only allowed \$5,000 on that claim, but Mr. Bush testified the loss was \$10,000, and therefore it must have been entered on the books as a loss of \$10,000, and as such must have entered into the \$28,000 loss which he says the books showed. Will the court presume that because plaintiff had this suit pending to recover that among other alleged damages, therefore he must have carried it on his books as an asset to offset the \$10,000 loss on the ties? If so, then there is absolutely no reason for not presuming that all the claims sued upon were entered as credits on the books, in which event there would be no loss at all. And of course we know this was not done.

When plaintiff made up its statement showing a loss of \$28,000 in 1911-12, and when Mr. Bush testified to that loss at the very beginning of his evidence, he did not know that the court was going to instruct the jury to return a verdict finding separately the items of loss on ties, and expense of transferring ties and attorney's fees, etc. And there is absolutely no reason why those items should not have been included in the expenses of the business on the books, and absolutely no reason to think they were not included, for they could have been. And therefore they must have entered into that \$28,000 loss shown by the books, unless the court is going to presume that, because they were involved in this suit, therefore the claim to recover them was carried on the books as an asset. And, as said before, if that assumption is to prevail, then the entire claim involved in this suit should be presumed to have been carried on the books as an asset, in which event the books could not have shown any loss at all.

We submit that there is absolutely no reason to presume that, in making up its statement of earnings and expenses showing profits and losses, to which Mr. Bush testified, plaintiff carried as assets mere litigated claims. And to say this is not to charge the making of a false statement on the books, but the contrary. No conservative concern would carry such claims as live, good assets; it might and would carry them in a profit and loss account, but not as live assets. And this is true beyond any possible question as to these claims for unliquidated damages involved in this present suit, such as damages to cross-ties, etc.

If then we exclude from the loss of \$28,000 those items (as they must have appeared on the books) which have since been paid, viz., the excess charges, and those losses specially allowed in the verdict, we have the following:

Loss shown in 1911-12.....		\$28,000.00
Excess charges on ties.....	\$12,000.00	
Damage to ties.....	10,000.00	
Cost of transferring ties.....	771.56	
Cost of supervision.....	200.00	
Attorney's fees.....	1,000.00	23,971.56
		<hr/>
Loss exclusive of the special items.....		\$4,028.44
To which if we add the profit of 1910-11.....		27,000.00
		<hr/>
We have the general damage to business.....		\$31,028.44
instead of \$50,000.		

Of course this is assuming the correctness of plaintiff's figures and assuming that there was a general damage to business for which defendant is responsible beyond making good the excess charges and the depreciation in ties, etc.; though, for the reasons already given, we do not believe defendant is thus responsible at all

507 Again, in conclusion upon this point and to this we ask the court's careful attention. When plaintiff simply proved the loss shown by its books for the year 1911-12, and afterwards proved certain items of loss or expense incurred in that year, and which would naturally enter into the books as part of the general loss, was it not incumbent on plaintiff, if this were not so, or if they had been in some way eliminated, then to say so? We submit this was not a matter incumbent on defendant to clear up by cross-examination. But plaintiff having testified simply to a general or total loss for a given year, and then to certain particular items of expense for that year, it is to be presumed, in the absence of any explanation to the contrary, that these items entered into, and formed part of, the total, and should not be allowed in addition.

No means of Separating in the Proof the Damage Done by Excess Charges on the Shipment Which the Court Allowed to be Considered and on Those Which it Held Should not be Considered.

One distinct and separate point or ground for reversal, which we made in our original brief, seems not to have been understood by the court. We evidently did not make our meaning plain. It seems to us to lead inevitably to a reversal and a new trial in order that justice may be done on another trial.

507½ In order to appreciate the point which we desire to make, it is necessary to understand exactly how this case was tried. When the petition was filed it alleged various alleged wrongful actions on the part of defendant, all with an alleged improper motive, and as the result of all of which plaintiff claimed damage in the sum of one hundred thousand (\$100,000.00) dollars. Among the wrongful actions charged, and the most conspicuous among them, was the overcharge on freight rates. Other actions complained of were the refusal to furnish cars promptly and the requirement that ties should be transferred from car to car at Louisville, etc. But

just said, the outstanding, conspicuous charge of wrong was the charge of excessive freight rates. These excessive charges were not alleged in a lump sum, but they were, to a certain extent, grouped in the petition. Thus the petition alleged that on 89 carloads which, according to the petition, were intrastate shipments, there was an excessive charge of \$8,012.61, for which excess the petition said action had been filed in the Jefferson Circuit Court, which was then pending (Rec., 3 and 4). And the petition also alleged that though the Interstate Commerce Commission had announced that by interstate rate on cross-ties in excess of the interstate rate on lumber was extortionate, nevertheless defendant continued to publish and maintain the fifth class rate (which is higher than the lumber rate) on the interstate shipments of cross-ties; that certain complaints on this subject had been filed by plaintiff before the Interstate Commerce Commission, but had not yet been decided (Rec., 5 and 6).

After the filing of the petition defendant filed a special demurrer, the first paragraph of which it demurred to so much of the petition as alleged the excess charges on the 89 cars for which plaintiff had sued in the State court; defendant's point being that to the extent to which plaintiff claimed damage for the excess charges on these 89 cars, it was splitting its cause of action and could not sue for part of the damage in the then pending case, and not in this case. And by the second paragraph of the demurrer defendant demurred to so much of the petition as complained of defendant's carrying excessive rates in its interstate tariffs; defendant's point being that this was a matter over which the Interstate Commerce Commission had sole jurisdiction, and that the State court had no jurisdiction (Rec., 43).

The court overruled the first paragraph of the demurrer, holding in effect that the pendency of the action to recover for the excess charges on the 89 cars, as to which suit was pending in the State court, was no reason why this action should not be based in part on the same wrong. But the court sustained the second paragraph of the demurrer on the ground that, while the Interstate Commerce Commission had no right to allow what the court called "general damage," yet the rates carried in the tariffs could not be alleged to be unreasonable until the Commission should decide that they were unreasonable (Rec., 47 and 48).

In other words the court by its ruling on this demurrer held that the plaintiff could recover damage in this present case, based in part on the excess charges on the 89 cars, which were involved in the then pending State court case, and which plaintiff claimed were intrastate shipments; but in substance held that as to the interstate shipments of which complaint was then pending before the Interstate Commerce Commission, no recovery could be had as yet, because the Commission had not yet determined whether or not the rates were unreasonable.

After this ruling on the demurrer, the plaintiff simply waited until the Interstate Commerce Commission did pass on the complaint then pending before it; and when this complaint had been decided,

plaintiff filed an amended petition in which it alleged that on cars of ties shipped from 24 points along defendant's railroad at various points north of the Ohio River, the defendant had made excess charges aggregating \$6,198.00; that the Commission had determined these charges to be excessive; and had ordered defendant to repay to plaintiff said sum of \$6,198.00 with interest (Records 49 and 50); with which petition there was filed as an exhibit a statement showing the 24 points from which the cars came, their weights, etc., and also an exhibit, being a copy of the Commission's order (Rec., pages 58 to 61).

Thus it will be seen that in the petition, as thus amended, there were two separate groups of shipments upon which it was complained that excess charges had been made, to-wit, (1) a group of 89 cars upon which there was an excess charge of \$8,012.61, and (2) a group of 91 cars upon which there was an excess charge of \$6,198.00, upon which complaint had been filed before the Interstate Commerce Commission, which had ordered defendant to pay back this excess. And these wrongful acts in making these excess charges constituted parts of the wrongs alleged in the petition, and on account of which \$100,000.00 damages were claimed; it being the opinion of the court, as expressed by its ruling up to this time, that plaintiff had a right to recover damage in this action on account of its wrongs in making the excess charges on both of the two groups just mentioned.

This was the situation, so far as the court's rulings on this matter were concerned, at the time we entered upon the trial before the jury, and when the plaintiff's president and chief witness, Mr. Bush, was testifying. He accordingly testified to all of these excess charges, to-wit, the excess charges on the 89 cars, amounting to over \$8,000.00, for which he had sued in the State court, and also the excess charges on the 91 cars, amounting to about \$6,200.00, on which he had made complaint before the Commission. And he also testified to excess charges of "between \$3,000.00 and \$4,000.00" made on certain other shipments not specifically referred to in the petition (Trans., 29 and 30); and all of this testimony was competent under the rulings which the court had made in passing on the demurrer to the petition.

Plaintiff also testified to the various other acts of which he complained. He also testified, for the purpose of course showing damage, to the fact that in the year 1910-11, the company had made a profit of \$27,000.00, whereas in the year 1911-12, it showed a loss of \$28,000.00 (Trans., 7). And by way of accounting for his loss to some extent, he testified and commented upon the fact that \$20,000.00 of the company's capital had been tied up at one time in overcharge claims (Trans., 121), which \$20,000.00 it will be observed were made up practically of the three items mentioned, to-wit, \$8,000.00 overcharge on the 89 cars involved in the State court, \$6,200.00 overcharge on the 91 cars covered by the Interstate Commerce Commission's order, and \$4,000.00 of the other excess charges on shipments not particularly described, aggregating

gating in all something over \$18,000.00, which the witness roughly refers to as \$20,000.00.

Thus there was absolutely no attempt on the part of the witness to distinguish between the damage which resulted from the overcharge of \$6,200.00 on the 91 cars involved in the Commission's order, and the overcharge of \$8,000.00 on the 89 cars involved in the State court case, and the overcharge of \$4,000.00 on the unspecified cars. And at that time, according to the court's rulings up to that time, there was no reason why the witness should attempt to divide up the damages, because the court had held that the damage from all of these overcharges was recoverable in this case.

But at the conclusion of the case, plaintiff's counsel were evidently afraid of the proposition that to permit a recovery based in part upon defendant's wrong in making the overcharge on the 89 cars
512 involved in the State court would be splitting of the cause of action, and were afraid to stand on their former position in that matter; and accordingly, without objection or exception from plaintiff the court, just before the jury retired, gave them the following oral instruction, to-wit:

"The court hereby excludes and instructs the jury not to consider any testimony relating to the charge and collection by the defendant, Louisville & Nashville Railroad Company, from plaintiff, Ohio Valley Tie Company, of what plaintiff claims were excessive rates on 89 carloads of ties, which were the subject of the action of the Ohio Valley Tie Company against the Louisville & Nashville Railroad Company, in which judgment was given for the alleged excess charges" (Rec., 128).

And in the first written instruction which the court gave, being the principal instruction, the court, so far as the effect of excess rates was concerned, confined the jury to the rates which had been covered by the order of the Interstate Commerce Commission; the language of that part, the first part of Instruction No. 1, being as follows:

"No. 1. If you believe from the evidence in this case that the rates on cross-ties which were found to be unreasonable by the Interstate Commerce Commission by its order of April 8, 1912, were to the extent said rates exceeded the rates then in force on lumber, willfully and maliciously maintained by defendant with the intent to injure plaintiff's business of buying and selling ties, or with the intent to deter plaintiff from buying ties along the line of defendant's railroad, and that said rates which were charged plaintiff were, when so maintained, known by defendant to be unreasonable to said extent," etc. (Rec., 123.)

513 Thus by these two distinct rulings, one by the instruction telling them that they must not consider the testimony they had heard relating to the charge of the excess rates on the 89 carloads of ties involved in the State court, and the other by the ruling expressly confining them, so far as damage resulting from the maintaining of excessive rates was concerned, to that damage resulting from the maintenance of the rates condemned by the Interstate Commerce Commission, the court instructed the jury that it could not consider any damage resulting from the excess charges on the one

group, and must confine themselves to the damage resulting from the excess charges on the other group. And by this instruction the jury were bound, and by it their verdict must be tested. But in the evidence there was absolutely no separation, or attempt at separation, of the damage resulting from the excess charges on one of these groups from the damage resulting from the excess charges on the other group; and no man, whether jurymen or judge, could possibly tell from the evidence what damage resulted from the one source, and what from the other. And yet they were expressly confined by the instruction to the damage resulting from one source, and were expressly told they must not consider the damage resulting from the other source.

Of course, if it were a mere question of allowing interest on the amount of the excess charges, the interest on one sum could be separated from the interest on the other sum; but it must be remembered that the damage, as expressed in interest, as being the legal
514 value of the use of money, is not what is claimed in this case, because that interest has in fact been paid, partly under the judgment in the State court case and partly under the Commission's order of reparation. And the damage sought for in the present case, on the plaintiff's theory, is a different kind of damage, some kind of a general damage which he described as damage to business, and impairment of credit, and which is said to be not measured by the exact measurement which interest affords.

As has been said, plaintiff's proof of damage was simply as a whole, resulting from these various wrongs, among which were excess charges on several different groups of shipments. And the result of which, according to plaintiff's theory, was expressed finally in the conversion of a profit into a loss. And yet we see that the excess charge to which the court finally confined the jury was not more than one-third of the entire excess charges to which plaintiff's witness had testified, and the result of which, as a whole, entered into the damage which plaintiff claims.

To give the instruction which the court did give, excluding the damage resulting from the excess charges on the 89 cars, and confining the jury to the damage resulting from the other excess charges, and yet to say that the jury's verdict must stand, when it is indistinguishable that there is no means, in view of the way in which this testimony was given, to separate the damage resulting from the one from that resulting from the other, would be in effect to try to make a straight, errorless record, so far as the instructions are con-
515 cerned, and yet produce no practical effect, so far as the substantial interests of the defendants are concerned. And that is exactly what has been accomplished in this case, if this verdict is allowed to stand. Defendant can no longer make the point that it was error to admit evidence of damage resulting from the excess charge on the 89 cars, or error to refuse to exclude that evidence, because the court finally so ruled. The defendant can not make the point that damages resulting from excess charges should have been confined by the Court's instructions to those resulting from the rule ruled upon by the Commission, because the court did finally so rule.

And yet plaintiff is allowed to recover just exactly as it would have recovered if no such instructions had been given, because, as said before, there is absolutely no means of separating these damages, under the evidence as it was given in this case. And plaintiff has in fact recovered almost the full amount claimed in the evidence, being within \$5,000.00 of the sum of the greatest profit ever made by plaintiff in any one year, plus the entire loss of the next year, although the excess charges on the shipments passed on by the Commission were only about one-third of the total excess charges to which plaintiff's witness testified on the stand as producing this damage.

We observe that even this court has made the mistake in its opinion of considering the effect of the identical excess charges which the circuit court excluded from the jury. Thus the court, in speaking of how plaintiff had been damaged, says it "was also deprived of more than \$12,000.00 of its invested capital by way of the 113 excess freight charges withheld by appellant." (141 K. 223.) This sum of \$12,000.00 evidently includes the two items of \$9,000.00, being the excess charge on the 59 cars in the State court case, and the \$3,000.00 of excess charges on the unspecified cars, the origins and destinations of which are not known. But none of these cars were the ones covered by the order of the Interstate Commerce Commission; and the making of the overcharges amounting to \$12,000.00, here referred to by this court in its opinion, was a matter which the jury, according to the rulings of the circuit court, had no right to consider. The excess charges on the shipments covered by the Interstate Commerce Commission's order only amounted to \$1,200.00. And if this court could fall into an error in this matter upon this record, with all the careful attention and study which it has given to it, with the written record before it, it is easy to understand the difficulty of the jury, with instructions telling them that they must separate certain damages from others, and with absolutely no means of making the separation.

Damage to Cattle.

On this subject, in its opinion, the court says:

"As to the \$5,000 allowed as damage to cattle, appellee's president is the only witness to testify. He swears the loss was \$10,000. From his evidence it appears that in the summer of 1911, appellee had over 20,000 tons on appellant's track, ready for shipment, and these were damaged 50 cents each by exposure to the weather due to delay in shipment; that in six months it will spoil and be as damaged as to be used as a 'bail,' and that when this suit was tried, about eighteen months afterwards, most of them were still on the track. But appellant says this delay was not so much due to the failure to furnish cars to move the ton as it was to appellee's failure to get a customer for them. It proves that a short while before the trial it called upon appellee to ship these and get them off the right-of-way, and that appellee responded that it had arranged in getting a customer and would endeavor to move them without delay. But it failed to do either. When the proof in the

whole case shows very clearly that the necessity to get a customer was forced by the loss of those it had, and that they were the reason of appellant's wrongful acts, it should not now be permitted to urge, by way of defense or extenuation, the result of those wrongful acts" (161 Ky. 226).

We simply ask the court to look at the record again in this matter and it will find that it is mistaken as to the facts. It will be observed that the court says: "It appears that in the summer of 1911, appellee had over 20,000 ties on appellant's track ready for shipment" and those were damaged 50 cents each by exposure, which damage will take place at the end of six months. The facts as to this matter are shown simply by the testimony of plaintiff's own witnesses and uncontradicted and unexplained documentary evidence, to wit: letters. According to Mr. Bush these ties began to accumulate on the line of defendant the first week in the spring of 1911. He examined on the subject as follows:

"Q. You said something about cross-ties that were allowed to lie on the right-of-way, as I understood you, of the Owensboro & Nashville Division of the Louisville & Nashville Railroad Company for two years, or until they rotted. Did I understand that?"

A. I didn't say that.

Q. How long had those cross-ties been lying there that you had named down there?

A. Probably a year." * * * (Trans., 182.)

"Q. Mr. Bush, can you tell me specifically or within a reasonable time, I will say, when any ties were laid on the right-of-way of the Owensboro & Nashville Railroad by the Ohio Valley Tie Company which were allowed to lie there for a year?"

A. Every week in the spring and summer of 1912, because we were buying ties, and took them out all the time."

The COURT:

"Q. 1912 or 1911?"

The WITNESS:

"A. 1911." (Trans., 185.)

Thus it appears from Mr. Bush's testimony that these ties began to accumulate the first week of spring. In other words, the first week of March, 1911.

It is further shown, as the court says, that a tie in six months will be depreciated. Now, whose fault was it that these ties lay on the ground there six months? The correspondence itself answers the question.

The following letters were introduced in evidence by Mr. Bush, and the superintendent of that division of the Louisville & Nashville Railroad Company, and were never either contradicted or explained by Mr. Bush.

The first is a letter of August 14, 1911, from Mr. Howland to Mr. Bush, as follows:

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"Aug. 14, 1911.

"Mr. C. P. Bush, Ohio Valley Tie Co., Louisville, Ky.

"DEAR SIR: You have a large number of ties at Belton and Dunmor, Epley and Island, on our property which are very much in the way and I will thank you to arrange to have same shipped promptly and oblige.

"Yours truly,

"SUPERINTENDENT."

(Trans., 314.)

To which Mr. Bush responded as follows:

"LOUISVILLE, KY., 8-15-11.

"W. P. Howard, Supt. L. & N. R. R., Russellville, Ky.

"DEAR SIR: Answering your letter of Aug. 14th, we beg to advise that we have just closed a large contract with the Penna. R. R., which will allow us to commence shipping from all the stations named in your letter. We hope to begin to load out early next week.

"Yours truly,

"OHIO VALLEY TIE CO."

(Trans., 314.)

Now, it will be observed that some of these ties, to-wit, those that were put on the right-of-way in the early part of March, had lain on the ground practically six months when this letter was written, and they had not been removed simply because the Tie Company had never sold them nor contracted for them. The L. & N. R. Co. was asking that they be moved and the Tie Company, without any suggestion that the L. & N. had
520 been at fault for their not moving, gives as a reason for their lying there that the Tie Company had "just closed" a contract for them with the Penna. R. R., and states that it hopes to begin loading out early the next week.

As a matter of fact, however, the first order for cars to move them was on October 8, 1911, when some of the ties had then been there more than seven months. Mr. Bush was not able to give the facts, personally, about orders to move these ties because he did not personally, know anything on the subject, and his general statement about orders to move the ties was excluded by the court because not competent. (Trans., 186.) He said, however, that the man who did know was "his representative in the territory." (Trans., 185.) This representative was Mr. J. E. Wright, who was put on the stand by plaintiff as a witness. And the first order that Mr. Wright could specify that he had given was on October 8, 1911. (Trans., 206.) The ties had then been on the ground more than seven months. And he then gave an order for only nine cars, which, at 300 ties to the car, would have moved only 2,700 ties; whereas, it is said, that there were over

20,000 ties on the ground. And he received at that time cars out of the nine he ordered.

The next order Mr. Wright mentions was on February 9, 1912 (Trans., 206), four months after the order of October 8th, when he had ordered only nine cars. And this time in February orders, first, only ten cars, though he claims afterwards to have increased the order to three cars per day, though he says that he fixed no specific time as to how long this was to run. (Trans. 521 209.) By the time this order was given in February the ties had been on the ground nearly a year.

In other words, these are the facts gathered from plaintiff's witnesses and the undisputed correspondence, to-wit: The ties began to accumulate on the ground at the beginning of March, 1911. They accumulated all through that spring and summer. Mr. Wright says every week. When practically six months had expired from the laying down of the first ties, the Railroad Company wrote Mr. Bush to know why he did not move those ties. Without making a complaint against the Railroad Company, he simply responds that he has just closed a contract with the Penna. Railroad and that he is to begin moving them next week. The first order that was shown for the removal of the ties is, however, not until October 8, 1911, when more than seven months had passed with the ties lying on the ground; and then there is an order for only nine cars which would move 2,700 ties out of 20,000. And the next order is four months afterwards, to-wit, on February 9, 1912, when the ties had been on the ground for nearly a year.

We submit, therefore, that it is absolutely in the face of the testimony of plaintiff's own witnesses, and the undisputed correspondence, to say that the fact that these ties remained on the ground for more than six months was the fault of the Louisville & Nashville Railroad Company. It is true that in December, 1912, which the court will observe was a year and seven months after these ties had been put on the ground, there was furnished correspondence in which there were charges by plaintiff of failure to furnish cars by defendant (Trans., 130, 131), but that was long after the ties must have spoiled, according to Mr. Bush's testimony, and only a short while before the trial of this case came on. And plaintiff can not make testimony for itself by simply writing letters and making charges.

General Matters.

There are just one or two statements in the court's opinion which we desire to correct, but which we are not well able to correct under any of the general subjects heretofore discussed.

Commenting on the effect of a certain circular issued by defendant to its agents as to how shipments could be made from ties to Louisville (Trans., 87, etc.), the court treated this as if it prevented the shipping of ties to local parties at Louisville, as the Louisville Railway Company. The circular never was intended to have any such effect, and is not properly susceptible

such a construction. There had been a controversy between the Tie Company and the Railroad Company simply over the question of shipping ties to the steam railroad companies when they were to be transported to points north of the river; the controversy being as to whether these shipments were interstate shipments, or whether plaintiff could make them intrastate shipments by the device of shipping first to Louisville and then reconsigning them. The controversy had never involved shipments to a concern like the Louisville Railway Company at Louisville. And this 523 circular was issued merely as bearing on the matters in controversy, indicating how shipments could be made that were known to be intended for these steam railroad companies, such as the Pennsylvania, the Big Four, the Monon, the B. & O., etc. Plaintiff had been trying the device of having cars shipped to itself in care of those companies, meaning then to reconsign and let the ties go to their ultimate destinations north of the river. And this circular was simply intended to stop that and require ties to be shipped direct either to the Ohio Valley Tie Company, or to the Railroad Companies. As said before, the subject of shipments direct to local Louisville parties had never been in controversy, and was not intended to be regulated at all by that circular. The court says:

"Observing that the Louisville Street Railway Company was not included within the list of favored consignees, if such they may be called, the president of the Tie Company went to see appellant's officials to inquire the meaning of this order, and was informed that the ties consigned to Ohio Valley Tie Company at Louisville would be delivered to the team tracks" (161 Ky., 219).

But the extraordinary fact, as admitted by Mr. Bush on cross-examination, is that when he went to see this official he never asked him one word about the right to ship or consign ties to the Louisville Street Railway Company, or any other local concern. The following is his cross-examination on the subject:

"Q. Did you ask the Louisville & Nashville Railroad Company if that circular meant that you could not ship goods or 524 ties direct to the Louisville Railway Company?

A. I did not. I asked what that clause '(referring to the clause relating to direct shipments to the Ohio Valley Tie Company)' allowed me to do, and they said it allowed me to ship to ourselves at Louisville.

Q. You could ship to yourself in Louisville?

A. Out on their team tracks at Ninth and Broadway.

Q. Did you ask them if you would have the privilege of shipping to any other party in Louisville direct?

A. No, sir.

Q. You didn't ask that question?

A. No, sir.

Q. You say you had these local customers and didn't ask if you could ship direct to those local customers?

A. I construed the circular to mean that I could not.

Q. You went out there to ask what the circular meant. Why didn't you ask that?

A. I thought the only avenue I had was to ship to myself at Louisville. I considered that circular just as Mr. Goodwyn put it on the outside, literally, as he says it must be construed, and I tried to get an outlet for my business under the only clause giving me a chance to do it, and that is to ship to the Ohio Valley Tie Company at Louisville.

Q. Although you had other Louisville customers, and although you say you construed that to mean you couldn't ship to other local customers, you didn't ask the Railroad Company for its meaning?

A. No, sir" (Trans., 179, 180).

Now under the circumstances, remembering what the contrary had been, if Mr. Bush had local customers at Louisville and was anxious to ship to them, and went to the Louisville & Nashville officials to find out whether or not he could do so, it is most extraordinary, in fact it is simply inexplicable, that he did not ask the simple direct question as to whether or not he would be permitted to ship to them. And yet he says he did not ask the question.

Again, on the subject of impairment of credit, the court says in its opinion:

"It is shown that one bank in Louisville, when it heard of the fight appellant was making, called one \$40,000.00 loan. For at least two years appellee was deprived of profit from this borrowed capital by the injury to its credit" (161 Ky., 223).

We must ask the court to look again at the record on this subject, and it will find it is mistaken as to the facts.

The only bank, or banker, which Mr. Bush claimed had curtailed the credit of the Tie Company was the First National Bank of Louisville through its president, Mr. Swearingen. And so far from its appearing that the \$40,000.00 loan held by that bank was required to be paid, thus depriving appellee of that much of its borrowed capital for two years, it appears from Mr. Bush's own testimony, in the first place, that Mr. Swearingen never spoke to him on this subject until after plaintiff's injunction suit was filed (Trans., 119), which was in September, 1911, and in the second place it appears that down to the time Mr. Bush testified on the witness stand, in April, 1913, that debt had never been paid. His statement was, "we are now reducing our business, gradually paying off the loan," referring to the loan in the

526 First National Bank (Trans., 120). Just how much of the loan he has paid off, or when he paid any of it off, does not say.

Furthermore, it affirmatively appears on his cross-examination that the First National Bank was the only bank which ever raised any question on this subject, and Mr. Bush does not say that he could not get the money he wanted from other banks, or that he ever tried, or failed. His cross-examination on that subject is as follows:

"Q. You do business with other banks in the city, do you not?

A. Yes, sir.

Q. You have not had difficulty in getting money which you wanted to borrow?

A. Yes, sir, we did. Our borrowing ability was cut down.

Q. By whom?

A. By the First National Bank.

Q. Any others?

A. No, sir." (Trans., 188.)

This court knows that there are a great many banks in the city of Louisville. As we have just seen, Mr. Bush expressly says he does business with other banks. And he does not say that he was not able to borrow from these other banks whatever moneys he wanted to borrow.

The Federal Question.

After the court in its opinion begins the discussion of our proposition that plaintiff's going before the Interstate Commerce Commission and asking damages and having them allowed and accepting payment of them is a bar to the prosecution of this
527 action, so far as based on the wrongful charge of rates, it then proceeds to discuss, quite extensively, the effect of the pendency of the State Court action to recover excess rates on eighty-nine cars. In fact, the court devotes nearly three pages of its opinion to that subject. But we have never made any point in this court on the effect of the pendency of the State court action, for the simple reason that when the State court finally came to instruct the jury, it adopted our view of that matter, as the plaintiff, also, in fact did, for it made no objection or exception to the ruling of the court excluding all the testimony on that subject, as we have heretofore shown with particularity in another part of this petition.

Then coming to the effect of the proceeding before the Interstate Commerce Commission, the court says that the objection based on that ground should have been plead in abatement and was not. But the facts appeared on the face of the petition as amended, and moreover it was not a matter of abatement, but a matter of failure to state a cause of action, so far as damage arising from the charging of excessive rates is concerned.

The Interstate Commerce Act, as pointed out in our original brief (pages 54, 58, 59) provides that a common carrier which has done any act prohibited by this law (and the charging of excessive rates is one of the things prohibited) shall be liable "for the full amount of damages sustained in consequence of any such violation of the provisions of this Act" (Section 8); and that any
528 person claiming thus to be damaged may either make complaint before the Commission, or may bring suit for damages in the District or Circuit Court of the United States; "but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the

two methods of procedure herein provided for he or they will adopt." (Section 9.)

Then follow provisions regulating what the procedure before the Commission shall be.

Then comes Section 16 which says:

"SECTION 16. That if after hearing on a complaint made as provided in Section 13 of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

"If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the Circuit Court of the United States for the district in which he resides, or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the Commission in the premises," etc. (Section 16.)

This is the only section of the statute which gives the right to go into a State court to recover damages for the doing of that which is prohibited by the Interstate Commerce Act. If a party chooses to go into court for damages, rather than before the Commission, he is required by Section 9 to go into the Federal court; and so the Supreme Court of the United States held in *Mitchell Coal Co. v. Penna. R. R. Co.*, 230 U. S. 250,

saying:

"The plaintiff's cause of action for damages occasioned by the payment of illegal or unreasonable allowances, was one which under Sections 8 and 9 of the Commerce Act could only be brought in the District or Circuit Court of the United States." (Page 250.)

But this Section 16, by an amendment which was not in the original Act, gives the right to go into a State court for damages under the conditions named in that section, namely, where the Commission has made an order for the payment of money and where "a carrier does not comply with an order for the payment of money within the time limit in such order."

Now in the case at bar, the plaintiff, by its amended petition filed May 28, 1912, showed that it had gone before the Commission with its complaint of unreasonable charges on the ninety-one carloads of ties; that it had asked that defendant be required to make reparation (Trans., 50); that the Commission had made the order prayed for (Trans., 51); and a copy of the order is filed as an exhibit with the petition showing that the defendant was "directed to pay unto complainant, the Ohio Valley Tie Company, on or before the first day of July, 1912, the sum of sixty-one hundred and ninety-eight (\$6,198.00) dollars, with interest thereon at the rate of six per cent per annum from April 21, 1911.

reparation for unreasonable rates charged for the transportation of ninety-one carloads of cross-ties," etc. (Rec., 59.) But the pleading did not allege that the carrier had failed to comply with that order; and, therefore, it did not allege cause of action.

It was no more necessary for the defendant to plead payment than it would have been necessary thus to plead in a suit on a promissory note where the petition failed to allege non-payment.

The court, however, in its opinion, constantly refers to the order of the Commission for the payment of this money as a mere "recommendation" and as a mere order for the payment of part of the damage caused by the wrongful act of making a charge of unreasonable rates; and it speaks of the Commission as recommending "the payment of special damage which flows from violation of a Federal Law."

The damage referred to in the Interstate Commerce Act is not special damage, it is not, in the sense in which this court uses the term, statutory damages. The damages referred to in the statute and which a party is given the right to recover, are all damages which he sustains from a violation of the Act by the carrier, and the charging of unreasonable rates is a violation of the Act. And the Supreme Court has expressly called attention to the fact that the damages referred to in the statute are all the damages which flow from the wrongful act.

Speaking on this exact subject in *Penna. R. R. Co. v. International Coal Co.*, 230 U. S. 184, the court said:

"The measure of damages was the pecuniary loss inflicted on plaintiff as the result of the rebate paid. Thus damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were recovered they could not be recovered. Whatever they were they could be recovered, because Section 8 expressly declares that wherever the carrier did an act prohibited, or failed to do any act required, it would be *liable to the person injured thereby for the full amount of damage sustained in consequence of such violation * * * together with reasonable attorney's fee.*" (Page 203.)

The italics in that part of the above quotation where the court quotes from the statute the words "liable to the person injured thereby for the full amount of damage sustained in consequence of such violation" are italics of the Supreme Court, showing that it meant to emphasize the fact that under the statute "the full amount of damage sustained in consequence of such violation" was recoverable, "whatever they were."

Now as to the order of the Commission being a mere recommendation, with no force or effect, the language we have already quoted shows that while the shipper has a right of election under Section 9, yet if he does elect to go before the Commission with a claim for his damages, and gets an order of the Commission allowing them he must accept it if the railroad company is willing to pay.

The shipper has already had his right of election and has exercised it; and he has no cause of action against the carrier, under the terms of the Act, unless the carrier fails to comply with the

order of the Commission. This is the language of the statute and the courts can not change it.

532 As to the statement of the court that the instructions of the circuit court prevent an allowance of any damage by reason of the act of charging excess freights (161 Ky. 227), we can only say that the court is in error as to the instructions as the following quotation from Instruction No. 1 will show:

"No. 1. If you believe from the evidence in this case that the rates on cross-ties which were found to be unreasonable by the Interstate Commerce Commission by its order of April 8, 1912, were, to the extent said rates exceeded the rates then in force on lumber, willfully and maliciously maintained by defendant with the intent to injure plaintiff's business of buying and selling ties, or with the intent to deter plaintiff from buying ties along the line of defendant's railroad, and that said rates which were charged plaintiff were, when so maintained, known by defendant to be unreasonable to such extent" * * * (then follows an enumeration of other charges of alleged wrongs) * * * "and that defendant, by such act or acts, if any were committed, did tie up part of plaintiff's capital, or did impair or injure plaintiff's business or credit * * *" and that thereby defendant was damaged, then the jury should find the damage—the court explaining how the damage should be determined. (Rec., 123—Appellant's original brief, page 15.)

Conclusion.

The judgment in this case is very large. With interest and damages (if it should be affirmed) it will amount to between \$60,000.00 and \$70,000.00. Every item of damage of which the plaintiff's president and chief witness could think, with the assistance of counsel, has either been paid back with interest, or separately
533 allowed by the jury. The defendant is only a transportation company; it has nothing to do with plaintiff's business in any other respect; it has nothing to do with the original cost of the ties to plaintiff, or the selling prices of the ties; its only connection was with the matter of transportation, it having been determined that excessive rates were charged, it has paid back that excess with interest. It being claimed that its refusal to allow ties to go through to points beyond the river in their original cars without change required plaintiff to spend money to make the transfer, all that extra expense and damage has been separately allowed by the jury. It being claimed that attorneys had to be employed to get the excess charges back, the fees paid to these attorneys have been separately allowed by the jury. It being claimed that some of the ties rotted on the ground, awaiting transportation, damage on that account has been separately allowed by the jury, although the undisputed testimony shows that the lying of these ties upon the ground until they depreciated was not the fault of the defendant. And it is shown by the testimony of plaintiff's own president, and the allegations of its own sworn petition, that the amount of business done by plaintiff in the year complained of was its normal, average business, to-wit, "approximately one million ties." Yet over and above all of the losses, expenses and damages that could be thought

of, which have been either paid, or specially allowed for, and although the normal average amount of business was done for the year, yet on some vague, general, indefinite charge of some
534 kind of damage to business, a judgment for \$50,000.00 has been given against this defendant.

It was a difficult case to try before a jury and a difficult case for the jury to understand. So far as concerned the broad general features of the case, bearing on the claim that defendant had acted badly towards plaintiff, matters calculated to arouse the passion of the jury, they were easily grasped by the jury. But as to the actual facts, as to actually what was done, and when it was done, and what was its real effect, we believe this court, after its own study of this record, must appreciate that it was a difficult case for the jury to accurately understand. We believe the circuit judge earnestly endeavored to try the case right, and we believe that his direction to the jury to separate their verdict into parts was a wise course, but we are absolutely satisfied that in this particular case it has resulted in allowing for several items of damage twice, which duplicate charges aggregate many thousands of dollars. On this subject we believe there is no substantial doubt. And we further believe that while the court's ultimate ruling, excluding from the jury the evidence as to damages flowing from excessive charges other than those passed on by the Commission, was right, yet inasmuch as the witness had not testified with that separation in mind, but had testified generally to all of these excessive charges, and generally as to the entire damage flowing from it all, the jury in its verdict here allowed damage for it all; because there was no separation in the evidence, and no basis upon which the jury, therefore, could separate the damage to plaintiff's business resulting from a part
535 of these wrongs from the damage resulting from those other parts, which the court excluded in its final instructions.

Of course, in this brief resumé we do not attempt to repeat the various points we have made in this petition, but we do believe that justice has miscarried; that the jury has simply been carried away, and, because it thought defendant's action was wrongful, has returned a large verdict without evidence to base it upon. It was said by this court in an old case decided a hundred years ago, that "whenever there are strong probable grounds to believe that the justice of the cause has not been fairly and fully tried, or that the verdict is clearly contrary to the evidence, a new trial ought to be awarded." (Mahan v. Jane, 2 Bibb, 33.) And the court in much later years, in some case, has commented upon the fact that when in a case like this a new trial is allowed, the parties are merely put back where they were at the beginning of the trial, with a full opportunity to try it over again. And we submit that justice requires that that should be done in this case.

Respectfully submitted,

HELM BRUCE,
Attorney for Appellant.

BRUCE & BULLITT,
Of Counsel.

December 24, 1914.

536

Afterwards at a Court of Appeals held as aforesaid on January 26, 1915, the following order was entered herein, to-wit:

L. & N. R. R. Co.

VS.

OHIO VALLEY TIE Co.

Jefferson.

The court being sufficiently advised it is ordered that the petition for rehearing herein be and the same is now overruled.

On the same day, to-wit, January 26, 1915, the Appellant and Plaintiff in Error filed in the office of the Clerk of the Court of Appeals its Writ of Error with allowance thereof by the Chief Justice of the Court of Appeals, also copy of said Writ, which Writ of Error is returned herewith as part herewith:

537

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of Kentucky, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Court of Appeals before you or some of you, being the highest court of law or equity in said State in which a decision could be had in a suit between the Louisville & Nashville Railroad Company, appellant, and the Ohio Valley Tie Company, appellee, wherein was drawn in question the validity of a constitution and statute of, and an authority exercised under, the State of Kentucky, on the ground of their being repugnant to the Constitution and laws of the United States, and in which the decision was in favor of their validity, and where a right, title, privilege and immunity were claimed under the constitution and statute of, and authority exercised under, the United States, and the decision was against such right, title, privilege and immunity specially set up and claimed by said appellant under said constitution, statute and authority, a manifest error has happened to the great damage of the said Louisville & Nashville Railroad Company as by its complaint appears;

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that

you have the same at Washington in the District of Columbia on the 25th day of February, next, in said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may

cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness Honorable Edward Douglass White, Chief Justice of the United States, the 26 day of January in the year of our Lord One Thousand Nine Hundred and Fifteen.

[Seal District Court of the United States, Wes. Dist, Ky.]

A. G. RONALD,
*Clerk of the District Court of the United States
for the Western District of Kentucky.*

Allowed this 26th day of January, 1915.

SHACKELFORD MILLER,
Chief Justice of the Court of Appeals of Kentucky.

A Copy.

Attest:

A. G. RONALD,
Clerk U. S. District Court.

1915 January 26th. Filed.

Attest:

ROBT L. GREENE, C. D. A.

539 At the same time, to-wit, January 26, 1915, the Appellant and Plaintiff in Error filed its Writ of Error Bond in the Clerk's office of said Court, which is in words and figures following, to-wit

540 Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
OHIO VALLEY TIE COMPANY, Appellee.

Know all Men by These Presents:

That we, Louisville & Nashville Railroad Company, and National Surety Company are held and firmly bound unto Ohio Valley Tie Company in the sum of Seventy Five Thousand (\$75,000.00) Dollars to be paid to the said Ohio Valley Tie Company or its successors. To which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our heirs, executors, administrators and successors firmly by these presents.

Sealed with our seals and dated this 26th. day of January, A. D. 1915.

Whereas the above named Louisville & Nashville Railroad Company hath prosecuted a writ of error from the Supreme Court of the United States to the Court of Appeals of Kentucky to reverse the judgment rendered in the above entitled suit, by the Court of Appeals of Kentucky.

Now, therefore, the condition of this obligation is such, that the above named Louisville & Nashville Railroad Company shall prosecute its said writ of error to effect, and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

541 LOUISVILLE & NASHVILLE RAILROAD
COMPANY. [SEAL.]
By HELM BRUCE, Att'y;
NATIONAL SURETY COMPANY, [SEAL.]
By HELM BRUCE, Att'y-in-Fact,
(As per Power of Attorney Hereto Attached.)

Sealed and delivered in presence of, and approved by,
SHACKELFORD MILLER,
Chief Justice of the Court of Appeals of Kentucky.

1915 January 26, A.D.

Attest:

ROBT. L. GREENE, C. C. A.

542 Know All Men by These Presents:

That the National Surety Company, a corporation duly organized and existing under the laws of the State of New York, and having its principal office in the City of New York, hath made, constituted and appointed, and done by these presents, make, constitute and appoint Helm Bruce of Louisville, Kentucky, its true and lawful Attorney-in-fact, with full power and authority hereby conferred in its name, place and stead, to sign, execute and deliver a bond or undertaking, as follows:

A supersedeas bond on behalf of the Louisville and Nashville Railroad Company on a Writ of Error from the Supreme Court of the United States to the Court of Appeals of Kentucky, in the case of the Louisville and Nashville Railroad Company, Appellant, vs. Ohio Valley Tie Company, Appellee, in the Court of Appeals of Kentucky, in which case petition for rehearing was overruled this day, and to bind the National Surety Company, thereby as fully and to the same extent as if such bond was signed by the President, sealed with the common seal of the Company, and duly attested by its Secretary, hereby ratifying and confirming all the acts of said Attorney-in-fact pursuant to the power herein given. This Power of Attorney is made and executed pursuant to and by authority of the following resolution adopted by the Executive Committee of the Board of Directors of the National Surety Company at a meeting duly called and held on the twentieth day of November, 1913:

"Resolved, That one of the Resident Vice-Presidents, and one of the Resident Assistant Secretaries of this Company, at Louisville, in the State of Kentucky, be and they are hereby authorized and empowered to make, execute and deliver, in behalf of this Company unto each person or persons in the State of Kentucky, as they may so

143 In fact, the power of attorney constituting and appointing such
each person its Attorney-in-fact, with full power and authority
to make, execute and deliver, for it, and in its name and in
its behalf, as aforesaid, any particular bond of undertaking that may
be required in the said State of Kentucky, the nature of such bond
or undertaking to be in each instance specified in the form of in-
surance."

In witness whereof, the National Surety Company has caused
these presents to be signed by its Resident Vice-President, at Louis-
ville, Kentucky, and its corporate seal to be hereunto affixed, duly at-
tested by its Resident Assistant Secretary, at Louisville, Kentucky,
this 25th. day of January, A. D. 1913.

NATIONAL SURETY COMPANY.

[mas.]

By J. WORTON MORRIS,

Resident Vice President.

Attest:

N. W. BRADFORD,

Resident Assistant Secretary.

(Revenue Stamp.)

Given at Kentucky,

County of Jefferson, ss:

On this day personally appeared before me, a Notary Public, in
and for the County aforesaid J. Worton Morris and N. W. Brad-
ford, who, being duly sworn by me, did depose and say that they are
respectively a Resident Vice President and a Resident Assistant Sec-
retary, at the City of Louisville, of the National Surety Company;
and they, as such Resident Vice-President and Resident Assistant
Secretary, respectively, did themselves acknowledge and follow the
 foregoing instrument of writing as and for the act and deed of the
National Surety Company.

Witness my hand and seal, this 25th. day of January, 1913.

144 My commission expires January 19th, 1914.

[mas.]

E. R. QUINN,

Notary Public, Jefferson County, State of Kentucky.

1913 January 25th. Glad.

248:

ROBT. L. GREENE, C. C. J.

145 At the same time, to-wit: — the Applicant and Plaintiff in
Error, did its Assignment of Error in said Clerk's office,
which is in words and figures following, to-wit:

any damages to plaintiff on account of defendant having charges to and collected from plaintiff unreasonable rates of freight for carriage of interstate shipments of cross ties."

10. The court erred in affirming the judgment of the Jefferson Circuit Court, and in thereby approving the ruling of that court controlling the action of defendant therein (plaintiff in error) to instruct the jury as follows, to-wit:

"The court instructs the jury that under the federal Act to Regulate Commerce, the defendant Railroad Company was required said Act to charge and collect from all shippers of interstate trade the rates of freight fixed by its tariff which was at the time of demand on file and in effect with the Interstate Commerce Commission at Washington, and it would have been a violation law to have charged or collected from any such shipper rate different from that which, at the time of the shipment was fixed by such railroad company's tariff then on file with the Interstate Commerce Commission and in effect, or to have made any arrangement whereby the payment of the rate fixed by such tariff should be avoided."

11. The Court erred in holding, in effect, as it did, by affirming the judgment of the Jefferson Circuit Court herein, that it was the duty of plaintiff in error, Louisville & Nashville Railroad Company to send its cars, loaded with cross ties belonging to defendant in error, Ohio Valley Tie Company, out of the possession or control of itself, the Louisville & Nashville Railroad Company, and on the railroads of other railroad companies upon the demand of Ohio Valley Tie Company; and that to require the Louisville & Nashville Railroad Company so to do did not deprive it of property without due process of law, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States; and that the circuit court had properly instructed the jury that it could allow damages against said Louisville & Nashville Railroad Company on account of its refusal to permit its cars to go out of its own possession and off of its tracks into the possession of another railroad company when so demanded by said Ohio Valley Tie Company.

12. The Court erred in affirming the judgment of the Jefferson Circuit Court and in thereby approving the action of that court controlling the action of defendant therein (plaintiff in error) to instruct the jury as follows, to-wit:

"The court instructs the jury that defendant, Louisville & Nashville Railroad Company, had a right to keep its cars on its own tracks, and it was not therefore guilty of a wrong in refusing to allow its cars to go off its own tracks."

13. The Court erred in refusing to reverse the judgment of the Jefferson Circuit Court on account of its decision against the claim made by the plaintiff in error, the Louisville & Nashville Railroad Company, of rights, privileges and immunities under the Constitution and statutes of the United States, and in affirming said judgment of the Jefferson Circuit Court.

Wherefore plaintiff in error prays that the judgment of the Court of Appeals of Kentucky be reversed.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY,
By HELM BRUCE, Attorney.

1915 January 26 Filed.

Attest.

ROBT. L. GREENE, C. C. A.

522 Afterwards on the 30 day of January, 1915, the Appellant and Plaintiff in Error filed in the Clerk's office of said Court of Appeals of Kentucky, its precept, which is in words and figures following, to-wit:

523 Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
OHIO VALLEY TIE COMPANY, Appellee.

The clerk of the Court of Appeals will please copy into the transcript of the record on the writ of error from the Supreme Court of the United States to the Court of Appeals herein, the entire record in the above entitled cause as the same is in the office of the clerk of the Court of Appeals of Kentucky, except the record in the case of Ohio Valley Tie Company, plaintiff, vs. Louisville & Nashville Railroad Company, defendant, No. 70,069, in the Jefferson Circuit Court of Kentucky, which record was read in evidence upon the trial of the case in which said writ of error has been allowed. A copy of the record in said case, No. 70,069, has heretofore been made and filed in the clerk's office of the Supreme Court of the United States and has been printed and is now filed therein. It is therefore not necessary to copy the same again.

HELM BRUCE,
Attorney for Appellant.

A copy of the foregoing precept was on this day, January 29, 1915, served by me upon John B. Haskin, counsel of record in Ohio Valley Tie Company, the defendant in error, referred to therein.

GROVER G. SALES.

524 Subscribed and sworn to before me by Grover G. Sales this January 29, 1915.

My commission expires at the end of next session of Kentucky Senate.

MARY BRODERICK,
Notary Public, Jefferson County, Kentucky.

Filed Jan. 30, 1915.

ROBT. L. GREENE, C. C. A.

On January 30, 1915, the following Citation with service endorsed thereon was filed in the office of the Clerk of the Court of Appeals:

555 UNITED STATES OF AMERICA,
Western District of Kentucky,
Sixth Judicial Circuit, ss:

To Ohio Valley Tie Company:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at the City of Washington in the District of Columbia on the 2nd day of February next, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of Kentucky, wherein the Louisville & Nashville Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States this 26th day of January, in the year of our Lord one thousand nine hundred and fifteen.

SHACKELFORD MILLER,
Chief Justice of the Court of Appeals of Kentucky

Service of foregoing citation is accepted this Jan'y 27/15.

556 Received the within Citation to appear and 1 copy at Louisville, Ky., Jan. 27, 1915, and executed same on John Baskin, attorney of record for defendant in error (as directed by the attorney herein), at Louisville, Ky., Jan. 27, 1915, by delivering a true copy hereof to said John B. Baskin.

Fees, \$2.00.

E. H. JAMES,
U. S. Marshal
 By J. C. SHELLEY,
Office Deputy

Filed Jan. 30, 1915.

ROBT. L. GREENE, C. C. A.

557 COMMONWEALTH OF KENTUCKY,
Court of Appeals, act:

In obedience to the commands of the attached Writ of Error herewith transmit to the Supreme Court of the United States a complete transcript of the record as called for in the præcipe filed here in the case of Louisville & Nashville Railroad Company, Appellant vs. Ohio Valley Tie Company, Appellee, as the same appears in the record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of my office.

Done at Frankfort, Kentucky, this 9th day of February, 1915.

[Seal Kentucky Court of Appeals.]

ROBERT L. GREENE,
Clerk of the Kentucky Court of Appeals.

Fee for transcript, \$108.00.

Endorsed on cover: File No. 24,568. Kentucky Court of Appeals. Term No. 824. Louisville & Nashville Railroad Company, plaintiff in error, vs. Ohio Valley Tie Company. Filed February 19th, 1915. File No. 24,568.

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SUPREME COURT OF THE UNITED STATES

LOUISVILLE & NASHVILLE RAILROAD

COMPANY, - - - - - *Plaintiff in Error,*

versus

OHIO VALLEY TIE COMPANY, - - *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

This is a suit begun in a State Court of Kentucky, involving a controversy between a shipper and a carrier over the reasonableness of rates charged for the transportation of cross-ties in interstate shipments. There were some other acts also complained of, such as refusal to furnish cars, and refusal to allow its cars to go off the carrier's own line, etc., but those things are merely incidental to the controversy over rates, and are shown by the record (including plaintiff's own testimony) to be merely the result of the carrier's effort to *protect its published interstate rates (being the rates herein involved) against the shipper's effort to evade them.*

The action is an action for damages brought by the Ohio Valley Tie Company, as plaintiff, against the Louisville & Nashville Railroad Company, as defendant, and was brought, as just said, in the State Court. The parties

will be referred to hereafter as plaintiff and defendant, in accordance with their designations in the court of first instance.

Plaintiff first took its complaint of the rates before the Interstate Commerce Commission, and succeeded in having them declared unreasonable; and it prayed for, and was allowed, an order of reparation for the damage done it by the charge of those rates, which damage the Commission fixed at the difference between the rates charged and those which the Commission fixed as reasonable; and *which order the defendant has complied with by proper payment.*

And now plaintiff has sued in the State Court and has recovered what that court calls "general" or "other" damages, which it finds resulted *from the acts complained of before the Commission, in connection with other acts*, these "other acts" being those heretofore mentioned, viz., the acts done by the defendant Railroad Company to *protect its published rates while they were in force* against plaintiff's efforts to evade them.

Defendant constantly insisted throughout the trial that the State Court had no jurisdiction to give judgment for damages based on the charge of unreasonable interstate rates. Other federal questions were also presented, which will be stated more in detail hereafter.

The facts shown by the record are substantially as follows:

In 1908, plaintiff, the Ohio Valley Tie Company, which is in the business of manufacturing or buying and selling railroad cross-ties, began doing business along the lines

of the defendant, Louisville & Nashville Railroad Company, in Kentucky, that is to say, began acquiring ties along these lines and shipping over these lines to the railroad companies north of the Ohio River, which were its customers, principally the Pennsylvania Company, the Big Four, and the Nickel Plate (N. Y. C. & St. L. R'y). The lines of those roads lie entirely outside of Kentucky (except that possibly the two former may touch the northern border of the State at Louisville on the south bank of the Ohio River), and of course, therefore, the shipments of these ties from interior points in Kentucky, destined to various points on the lines of these northern roads were interstate shipments. Plaintiff's own president says, "the bulk of our ties at that time were interstate shipments" (Record, 69). And, again, in speaking of the shipments to the three railroad systems mentioned, he says, "They are practically our only customers; they take 90% of our business" (Record, 139).

It appears that for two years after plaintiff began thus shipping over the defendant's lines, to-wit, until some time in 1910, through some kind of misunderstanding or oversight, plaintiff did not pay defendant its interstate rates on *cross-ties*, as fixed by the published interstate tariff of defendant, but paid the rates there fixed on *lumber*. The situation was this: The published tariffs of defendant filed with the Interstate Commerce Commission showed that cross-ties were carried in the fifth class, and bore of course the rates fixed for that class of articles. *Lumber*, however, was not included in the fifth class of rates, but had a special "commodity

rate," which was considerably *lower than the fifth class rate*. The Railroad Commission of Kentucky in 1905 made an order, applicable of course *only to intrastate shipments*, to the effect that cross-ties should carry the same rate as the lumber from which they were made. The intrastate rate on cross-ties, therefore, from an interior point in Kentucky to any other point, such as Louisville, was the *same as the lumber rate*, and was, therefore, lower than the interstate rate on cross-ties going from some interior point in Kentucky to some point in another State, because that was *higher than the lumber rate*. But, as said before, until some time in 1910 the lumber rate was applied to plaintiff's shipments, although *interstate* in character, so that the proportional parts of the freight charges which the defendant during those two years had been collecting on plaintiff's interstate shipments of ties, for that part of the haul from the point of origin to the Ohio River, was *less than was required by the defendant's published tariffs*.

This difference between the rates on cross-ties and the rates on lumber had in fact existed for a great many years. Mr. Milton H. Smith, president of defendant, though called as a witness for plaintiff, testified that the difference in rates between cross-ties and lumber had existed as far back as 1869, and continuously since that time, so far as he knew (Record, 155). And it was shown by the testimony of one of defendant's witnesses, Mr. Dulaney, that the published tariffs had shown this difference as far back as the witness was asked to examine these tariffs, to-wit, as far back as 1902 (Record, 178-

180). The order of the Kentucky Railroad Commission making the intrastate rate on cross-ties the same as that on lumber had been made in 1905 (Record, 67). How the lumber rate came to be applied to plaintiff's interstate shipments for two years after it began to do business with defendant, to-wit, from 1908 to 1910, is not explained, and in fact nobody seems to know, but the fact exists, as admitted on both sides. Mr. Dempf, the local freight agent of defendant at Louisville, says that, so far as he can recall, the matter was never called to his attention until the summer of 1910 (Record, 192). Whatever may be the explanation, the fact is that for two years plaintiff paid defendant less than the lawful rates.

But when this condition of affairs was discovered, or, certainly, when it came to the attention of some of the higher officials of defendant in 1910, the defendant began charging its proper interstate rates on cross-ties, as shown by its published tariffs on file with the Interstate Commerce Commission. And quite a correspondence over the subject grew up between the officials of plaintiff and defendant, which ran through the year 1910, and into the year 1911; defendant's officials insisted that its published rates must be paid, and plaintiff's officials insisted that they were unreasonable (see correspondence running from July, 1910, to December, 1910—Record, 83-87). Defendant, however, refused to change its rates, and we find correspondence on this subject still continuing in the fall of 1911, when we see a letter from plaintiff to Mr. Goodwyn, General Freight Agent of defendant, of October 3, 1911, insisting that these rates be changed so

as to make the rates on cross-ties the same as on lumber, and a letter from Mr. Goodwyn declining to do so (Record, 88).

This being the condition of affairs, plaintiff asking that the interstate rates on cross-ties be made the same as the lumber rates, which was the rule on intrastate rates under the order of the Kentucky Railroad Commission, and defendant refusing to do so, *the plaintiff undertook to evade these interstate rates*. This is made indisputably clear by this record, and the fact can not be said to be contradicted. It appears from the testimony of plaintiff's own president, and is apparent from the facts as stated in the opinion of the Court of Appeals of Kentucky. Mr. Bush, plaintiff's president, after having stated that the first time a charge was made against plaintiff at the higher interstate rate, he thought this was a mistake, then says, "but in August, 1910, we began to receive settlements from the Nickel Plate showing they were assessing the higher rate on *all shipments*" (Record, 74), and then, in speaking of the plaintiff's course when it saw this was being done, he said:

"When we received the second settlement showing all cars were now being assessed at the higher rate, *we changed our method of doing business*. We shipped those cars to the Ohio Valley Tie Company, Louisville, Ky., in care of the Big Four Railroad Company and *paid the L. & N. Railroad Company freight up to Louisville at the lumber rate and re-consigned the cars to the Nickel Plate.*" (Record, 75.)*

* All italics in this brief are those of the writer of the brief, except where otherwise stated.

This of course was an effort, by a mere shift, or change in form, to make it appear that these interstate shipments were intrastate shipments, although the witness expressly admits, on cross-examination, that the character of the business was just the same after this change in form as it had been before. This appears from the following cross-examination:

"Q. In your testimony yesterday you said in substance that after the Louisville & Nashville Railroad Company began charging and compelling you to pay the fifth class rates on cross-ties in interstate commerce, the Ohio Valley Tie Company changed its methods of doing business, and began shipping its ties to Louisville. Now, when was that?

A. In August, 1910, after we received settlement from the Nickel Plate showing they had charged us \$7,900 on those cars, \$1,700 of which they refunded in the claims, and \$6,200 of which we received from the Interstate Commerce Commission.

Q. The question was *what was the change* in your method of doing business?

A. Shipped the ties which were intended for the Nickel Plate road in care of the Big Four Railroad in Louisville, and *paid the Louisville & Nashville Railroad Company freight to Louisville, and reconnected the car to Erie, Pa.*

Q. *The business was practically the same character of business that it had been before, wasn't it?*

A. *Yes, sir.*" (Record, 137, 138.)

This is the testimony of plaintiff's president, and shows beyond any possible controversy that plaintiff was seeking to evade defendant's published tariff by a mere change of form.

Moreover, the Court of Appeals of Kentucky, in its statement of the facts pertaining to this matter, though trying to excuse the plaintiff, shows unmistakably that plaintiff's effort was an effort to evade defendant's tariff. Speaking of the change in defendant's course, in beginning to demand payment of its proper published interstate rates, as it did in 1910 (instead of allowing the interstate shipments to go through on intrastate rates), the Court of Appeals says:

"This change in the policy of appellant affected only interstate shipments. In other words, these excess charges were applied only on cars consigned to points outside of Kentucky. *In seeking a way to evade the embargo* thus laid upon its business, the appellee remembered that the Big Four and the Pennsylvania lines enter Kentucky at Louisville. Except such tracks as they have in Louisville, their systems are located outside of Kentucky, and all the ties that had been purchased by them *were used and consigned to points in other States*. The Nickel Plate had no track in Kentucky, and appellee was forced to give up that contract entirely, but as to the Pennsylvania and Big Four it *hit upon the plan* of consigning the cars to them at Louisville." (Record, 211, 212.)

While the court here speaks of the plan that plaintiff "hit upon" for the purpose of evading the rates on shipments to the Pennsylvania Company and the Big Four, we have already seen by the quotations heretofore made from the record, that a similar plan was "hit upon" as to the shipments to the Nickel Plate.

And the Court of Appeals has held that the plan thus "hit upon" was a success, because the court held that

this mere shift, or change in form, had the effect of changing the legal character of these shipments and converting them from interstate shipments to intrastate shipments. Speaking of this change in plan, the Court of Appeals says:

"Almost immediately after this method was attempted, the appellant began to apply the class rate on these *shipments to Louisville*, and very soon it had collected on 89 cars so consigned \$8,100.00 more than the rate would have been for lumber, or than it had theretofore been collecting on cross-ties shipped between points within the State. Matters continued this way until the summer of 1911, when the appellant refused to deliver cars at Louisville consigned to these railroads, *they having refused to pay the fifth class rate*. A suit was filed in the Jefferson Circuit Court for a mandatory injunction requiring a delivery of the cars *on payment of the lumber rate*, and to recover the \$8,100.00 excess charges theretofore collected on the intrastate shipments. Appellant resisted the action on the ground that the purchasing carriers never intended to use them in Kentucky, and although consigned to these carriers for delivery in Kentucky, the ultimate purpose was recarriage to a destination along their lines outside of the State. The ties were, therefore, matters of interstate commerce, as it contended. In the lower court, the prayer of the appellee was granted, and judgment was given it for the overcharge, \$8,100.00. The case was appealed to this court, *L. & N. v. Ohio Valley Tie Co.*, 148 Ky. 718, and the judgment was affirmed.

"*We there held the ultimate destination was not the controlling feature in determining whether the shipments were interstate or intrastate:*

"*As the contracts of shipment provided for transportation from points within the State to Louisville, another point with the State, it was entitled*

under its contract to the intrastate rate, a right which no purpose or subsequent conduct on the part of the purchasing carrier could in any way affect.'" (Record, 212.)*

In other words, the court held that plaintiff's subterfuge in making these shipments *appear* to be intrastate, by billing the shipments to Louisville, when they were in fact interstate, was successful; because the court held that in determining their legal nature "*the ultimate destination was not the controlling feature,*" but that the "*contract of shipment,*" viz., *the bill of lading, was what controlled.* The facts as to these shipments, and the Railroad Company's position in the matter are thus fairly stated in the Court of Appeals' opinion in 148 Ky. 718, referred to in the opinion in the present case, to-wit:

"For appellant it is insisted that because the *purchasing carriers had the right to give shipping directions,* and the waybills or contracts of shipment showed that the ties were shipped to the purchasing carriers in care of parties who, *as a matter of fact, did not live in Louisville,* and inquiry developed the fact that *the ties, without being unloaded, went through in the same cars to points outside of the State,* the shipments, notwithstanding the contracts of shipment, were actually destined to points outside of the State, and having actually started in the course of transportation to another State, were

* The Court of Appeals in this connection says a writ of error was taken from the Supreme Court of the United States to review that judgment, but was abandoned and the judgment paid before the answer was filed in this case. But that statement is not supported by anything in this record, and is wholly incorrect. The writ of error was taken, and the record lodged in this court and printed (Louis. & Nash. R. R. v. Ohio Valley Tie Co., October Term, 1912, No. 740). But before it was reached for argument the matter was *compromised* and the writ dismissed for that reason. The Railroad Company never for one moment abandoned the proposition that the shipments were *interstate*. Two cases had been decided by this court just before the settlement, as others have been decided since, which showed conclusively that the shipments were *interstate*.

necessarily interstate commerce. *In other words, it is insisted that the contracts of shipment do not control, in view of the fact that the ties were destined to, and actually went to, points outside of the State.*" (Page 720.)

The court, however, as we have said, held that the contracts of shipment *did control* and that the ultimate destination *did not*.

But that this is not the law, and that the essential character of these shipments made them interstate and not intrastate, is, in view of a series of late cases, hardly debatable. All these cases are reviewed in *Pennsylvania R. R. Co. v. Clark Bros.*, 238 U. S. 456, wherein the court said:

"In determining whether commerce is interstate or intrastate, *regard must be had to its essential character. Mere billing, or the place at which title passes, is not determinative* (p. 466). * * * Commerce among the States is not a technical conception, but a practical one, drawn from the course of business (p. 467). * * * The court held the rate fixed by the Interstate Commerce Commission was applicable, as the lumber was *destined for export*, and that, as the movement was one *actually in the course of transportation to a foreign destination*, the form of the billing to Sabine, and the transactions there, were not determinative (p. 468) * * * that principle is that the jurisdiction of the Commission is determined by essential character of the commerce in question * * * and the arrangements that are made between seller and purchaser with respect to the place of taking title to the commodity, or as to the payment of freight, *where the actual movement is interstate*, does not affect either the power of Congress or the jurisdiction of the Commission" (p. 468).

Manifestly, therefore, the defendant in the case at bar was right in its position that these shipments of ties were interstate shipments, and in insisting that its published interstate rates must be paid as long as they were in force, and in trying to protect them against evasion by plaintiff.

It therefore refused to allow its cars to be used for through transportation to points outside the State, and required them to be unloaded at Louisville (their nominal destination), *unless the interstate rate should be paid*. That this was defendant's position is shown by the testimony of plaintiff's president, who was examined by its counsel as follows:

"Q. I believe you said the L. & N. refused to deliver ties shipped by your company in carload lots to the Pennsylvania Company at Louisville, unless the higher rate of freight was paid, or unless the ties were unloaded.

A. Yes; if we would pay the high rate of freight, they would set the car over without any request for transfer, but if we refused to pay the high rate of freight, they would require the ties transferred." (Record, 109.)

It thus indisputably appears that all defendant did was to protect its lawful published rate. *Whenever that was paid, the ties went through to their ultimate destination without unloading.*

And so in the matter of *furnishing cars* at point of origin, defendant insisted that *its own cars be used* for loading plaintiff's ties, so that defendant could control them (under the principle of Louisville & Nashville R.

Ex v. Central Stockyards, 212 U. S. 132), and not have them taken from its possession with the ties in them and carried on to their foreign destinations upon the payment of other than the legal published interstate rate. And again plaintiff's president admits that *there was never any trouble about this matter of furnishing cars in which to load ties, but that they had "worked entirely in harmony with the L. & N.," until this controversy over the rates arose* (Record, 107, 113, 118).

We therefore repeat the statement which we made in the beginning that this is simply a controversy over interstate rates, and that whatever else there is in the case, such as complaints of refusal of defendant to furnish cars in which to load ties, and refusal to let its cars thus loaded go off its rails into other States, is merely incidental to the question of rates, and that the acts done in this respect by defendant were done merely to protect its published tariff rates against a flagrant attempt by plaintiff to evade them.

The foregoing is a statement of the main ultimate facts shown by this record, out of which legal proceedings have grown, and those proceedings we will now briefly state, as follows:

1. On September 14, 1911, the Tie Company brought suit in equity against the railroad company in the Jefferson Circuit Court of Kentucky, in which it sought, and obtained, a mandatory injunction, commanding the railroad company to receive certain cars, when billed in a certain way, and to deliver those cars over to the Pennsylvania Company at Louisville upon tracks controlled

by the latter company, upon payment of *intrastate rates* on the shipments (Record, 6). These were shipments of the character hereinbefore mentioned, which the Tie Company claimed were intrastate shipments, because billed to Louisville, but which the railroad company insisted were interstate shipments, because they were in fact destined to points outside of Kentucky.

2. On the following day, September 15, 1911, the Tie Company filed before the Interstate Commerce Commission at Washington a complaint against the railroad company, complaining that on 91 cars of cross-ties, shipped from twenty-four different points in Kentucky, and one point in Tennessee, to various points north of Kentucky, it had been charged excessive rates, the shipments being conceded to be *interstate shipments*, being shipments which had been made between May 27, 1910, and April 10, 1911, and praying that defendant might be required to make reparation for the damage done by the making of these excessive charges (Record, 23, 24).

3. On September 30, 1911, the Tie Company instituted an action in the Jefferson Circuit Court, seeking to recover certain excessive charges on 89 cars of ties which it claimed were *intrastate shipments*. The amount claimed in that case was \$8,009.71 with interest; and plaintiff ultimately recovered a judgment for \$8,189.91 (including interest), which is the judgment that was affirmed by the Court of Appeals in 148 Ky. 718, heretofore referred to, and which the Court of Appeals in the present case refers to in its opinion. In that opinion the Court of Appeals speaks of the suit in the State Court

to recover excess charges, and the suit for a mandatory injunction to compel defendant to deliver its cars to the Pennsylvania Company upon payment of intrastate rates, as if the two suits were one and the same, in other words, as if they were one suit, seeking two kinds of relief. That is an incorrect statement, but the error is not material, because while they were separate suits, they really involved the same character of shipments, and in fact, to a certain extent, involved the same identical shipments. The character of the shipments is that heretofore described at some length, and which is still more fully described in the opinion of the Court of Appeals in *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 148 Ky. 718, being shipments made by the Tie Company in the effort to evade the interstate rates of the railroad company pursuant to the plan which it had "hit upon" for that purpose.

4. Finally, on December 9, 1911, after the three above-mentioned proceedings had been instituted, respectively, on September 14, 1911, September 15, 1911, and September 30, 1911, and when all three were pending and undetermined (though a preliminary mandatory injunction had been granted in the first one), plaintiff instituted the present action for \$100,000.00 damages, in which it referred to all of the foregoing litigation, and charged that the rates which defendant had charged on interstate shipments of cross-ties were unreasonable and excessive, and that defendant had refused to deliver its cars loaded with cross-ties upon the tracks of connecting railroads at Louisville "except upon payment of the in-

terstate rate, or upon condition that said cars be unloaded and promptly returned to defendant" (Record, 8), and had delayed transportation of its ties, etc. In the course of this petition plaintiff referred specifically to all three of its previous proceedings herein mentioned. It specifically showed the pendency of a proceeding before the Interstate Commerce Commission, complaining of extortionate rates on interstate shipments (Record, 3, 4—though in the original petition the details of this proceeding were not given, they being afterwards given by an amended petition); and it set forth the pendency of the action in the State Court seeking to recover excess charges (\$8,012.61) on shipments which plaintiff claimed were intrastate shipments (Record, 2, 3); and it also pleaded the granting of the mandatory injunction by the State Court requiring defendant to deliver its cars containing ties to the connecting roads at Louisville upon payment merely of the intrastate rates (Record, 6).

The petition is very long, and is full of charges, oft repeated, of malice and wilful wrongdoing, etc., and alleges that by the various acts complained of (all of which, except the fixing of the rates in controversy, were the result of plaintiff's own wrong in attempting to evade the published tariff rates and of defendant's efforts to protect them), it had been damaged in the sum of \$100,000.00.

To this petition defendant filed a demurrer in two paragraphs. The first paragraph of the demurrer was simply to so much of the petition as sought in this case to recover damages for the charge of excessive rates on the 89 carloads of cross-ties, alleged to be intrastate

shipments, which were involved in the other case pending in the State Court at the same time, in which plaintiff was seeking to recover those same excessive charges; the ground of this paragraph of the demurrer being that plaintiff could not in this way split its cause of action, growing out of those alleged excessive charges. This of course involved no federal question. The second paragraph of the demurrer was in the following terms:

“Defendant demurs to so much of the petition herein, as complains of defendant’s alleged wrong in publishing in its tariffs for the transportation of *interstate* freight rates on cross-ties which were alleged to be extortionate and unreasonable; because under the Act of Congress entitled ‘An Act to Regulate Commerce,’ approved February 4, 1887, and its various amendments, the only tribunal having any right or power to give redress against the alleged wrongs complained of is the Interstate Commerce Commission of the United States, and *this court has no jurisdiction* to give relief for the aforesaid alleged wrong, or wrongs.” (Record, 20.)

Thus it will be observed that this second paragraph of the demurrer specifically raised the objection *to the jurisdiction of the court* on the ground that it had no power to give relief for the alleged wrong of charging excessive interstate rates.

The court, although overruling the first paragraph of the demurrer, sustained the second paragraph, but did so pursuant to a written opinion in which the court showed that its ruling in this respect was *only temporary*. The court held, in effect, that the Interstate Commerce

Commission had no power to award what the court called "*general damage*," but that plaintiff would have to first get the ruling of the Commission to the effect that the particular rates complained of were excessive. The language of the court in this part of the opinion was as follows:

"It seems clear that the Interstate Commerce Commission has the exclusive right to determine whether certain interstate rates as published are unreasonable or discriminatory. (Citing authorities.) While the Commission can not award *general damage*, for the enforcement of such extortionate or discriminatory rates, yet it can not be adjudged that *general damage* has been sustained, until the Commission has determined the rate unreasonable." (Record, 22, 23.)

After this ruling of the court plaintiff simply waited until the Interstate Commerce Commission acted on plaintiff's pending complaint, which had been referred to in its original petition. Then when that complaint had been acted upon by the Commission, plaintiff filed in the present case an amended petition in which it stated that between May 27, 1910, and April 10, 1911, it had shipped 91 cars from various points in Kentucky and one point in Tennessee to various points in Ohio, Indiana and Pennsylvania, upon which defendant had charged and collected excessive rates; and that plaintiff had on September 15, 1911, filed its complaint before the Commission, complaining of the rates thus published, and that defendant be required to cease and desist from charging or collecting such rates, and that it be required to make

reparation; the details of these shipments being set forth in an exhibit filed with the amended petition (Record, 28). And it then alleged that on the 8th day of April, 1912, the Commission had made an order granting the relief prayed for by plaintiff; and a copy of that order of the Commission was likewise filed as an exhibit with the amended petition, and showed that the Commission had determined the rates complained of to be unreasonable, and had ordered the defendant to cease and desist, on or before July 1, 1912, for a period of two years, from charging, demanding or collecting on cross-ties from the specific points of origin therein named to points north of the Ohio River, any rates in excess of the lumber rates between those points, and *had ordered defendant to pay to plaintiff, on or before the 1st day of July, 1912, \$6,198.00 with interest from April, 21, 1911, as reparation* (Record, 28, 29).

It will here be observed, and to this we call the court's particular attention that while this amended petition thus specifically shows that the plaintiff had gone before the Commission with its complaint as to these alleged excessive rates, and had asked reparation, and that the Commission had held the rates to be unreasonable, and had ordered that the defendant cease and desist from charging them in the future, after July 1, 1912, and had made an award of damages which it had authorized and directed defendant to pay "on or before the 1st day of July, 1912," the amended petition *did not* allege that the *defendant had failed or refused to obey or comply with this order for payment*. And this was no oversight, be-

cause the fact is, as admitted by plaintiff's persident on the witness stand, that *this order was complied with and paid by the defendant* (Record, 133).

This amended petition also contained the following specific statement with reference to this order of the Commission, viz.:

"Plaintiff further states that all the expenses which it alleged in its original petition that it had incurred on account of the publication by defendant of extortionate interstate rates on ties, and all the damages which it alleged in its said petition that it had suffered as a result of the publication of interstate rates, were incurred and suffered as a result of the publication of said extortionate rates which were condemned by the Interstate Commerce Commission by its said order of April 8, 1912, in case No. 4411, Sub. No. 1, and plaintiff further states that the interstate rates on ties of the publication and collection of which it complains by its original petition are the rates condemned by said order of April 8, 1912." (Record, 26.)

In view of the court's previous ruling, which, as we have seen, was in substance to the effect that plaintiff must first get a ruling of the Commission as to whether or not the rates charged were unreasonable, but that the Commission had no power to award what the court calls "general damage," and that plaintiff could seek the so-called "general damage" in this action after obtaining the ruling of the Commission on the reasonableness of the rates, defendant did not repeat its demurrer after the filing of this amended petition, recognizing that it could raise the same question on motions to exclude testimony, or on motions for instructions upon the trial.

The issues being finally made up, the case came on for trial before a jury. Plaintiff's President, Mr. C. P. Bush, testified at great length, as the bill of exceptions and the transcript of testimony show. He testified expressly about the character of the plaintiff's business, and the fact that for two years defendant did not collect from plaintiff defendant's regular published tariff rates on interstate shipments, which he says constituted the bulk of plaintiff's business, but that it began charging these rates in 1910. And he testified that they were very excessive, and that the Interstate Commerce Commission had so held them to be; and he introduced in evidence both the report and the order of the Commission with reference to the rates, of which he had specifically complained; and he also read in evidence the record in the other suit in the State Court, in which plaintiff had recovered judgment for the excessive rates therein complained of; and he testified that the collection from the plaintiff of these various alleged excessive rates, both on interstate shipments, and also on those which he claimed were intrastate shipments, had tied up plaintiff's capital to its great damage; and that plaintiff was also damaged by the fact that defendant would not allow its cars loaded with cross-ties to go outside of Kentucky, but required them to be unloaded at Louisville, unless the interstate rates were paid upon the shipments, *though he showed that there was never any objection made to these cars going out of the State when these interstate rates were paid.* He also testified as to trouble about getting cars in which to load plaintiff's ties, and that de-

defendant insisted on loading into its own cars and would not accept foreign cars in which to load, *though he also showed in this connection also that there was never any trouble of this kind until this controversy arose as to rates.*

At the conclusion of the evidence defendant made the following motions for the exclusion of testimony:

"1. Defendant moves the court to exclude and withdraw from the consideration of the jury all testimony of the witness, C. P. Bush, to the effect that on interstate shipments of cross-ties the L. & N. Railroad Company charged to and collected from the Ohio Valley Tie Company the rate fixed in its interstate tariff on fifth class freight; and all testimony to the effect that the rates thus charged and collected were higher than the rates charged on interstate shipments of lumber; and all testimony to that effect that the rates thus charged and collected on cross-ties were unreasonably high or unjust; *because, under the Interstate Commerce Law of the United States, the Interstate Commerce Commission alone has the power to determine whether or not a rate charged and collected is unreasonable, and the right to determine what damage, if any, has been caused to a shipper by the charging of an unreasonable rate, and the fixing of the amount to be paid by the railroad company to a shipper as damages on account of the charging of such unreasonable rate; and THIS COURT HAS NO JURISDICTION to consider or determine the amount of damages that shall be charged to a shipper on account of the fact that a railroad company has charged to him and collected from him an unreasonable rate for the carriage of goods in interstate commerce; and in support of this motion, the defendant relies on the Act of Congress of the United States, ordinarily known as 'An Act to*

Regulate Commerce,' approved February 4, 1887, and the various amendments thereto.

"2. Defendant moves the court to exclude and withdraw from the consideration of the jury any and all testimony offered in this case to the effect that the L. & N. Railroad Company charged to the Ohio Valley Tie Company fifth class rate on cross-ties moving in interstate commerce; and any and all testimony to the effect that such rates thus charged were too high, or unreasonable or unjust for any reason; and all testimony as to any damage done to the Ohio Valley Tie Company by reason of such charges; because under the Interstate Commerce Law, of the United States, to-wit the act entitled 'An Act to Regulate Commerce,' passed by the Congress of the United States, and approved February 4, 1887, and the various amendments thereto, the sole right and jurisdiction to determine the question of the reasonableness or unreasonableness of a rate charged on interstate freight, *and to determine also the question of the amount of damage done to a shipper by reason of the charging of an unreasonable rate, is vested in the Interstate Commerce Commission, and this court has no power to determine such questions.*

"3. The defendant also moves the court to exclude and withdraw from the consideration of the jury all testimony relating to the charge and collection by defendant from plaintiff, the Ohio Valley Tie Company, of what plaintiff claims were excessive rates on eighty-nine carloads of ties, which were the subject of the action of the Ohio Valley Tie Company against the Louisville & Nashville Railroad Company, in which judgment was given by the Jefferson Circuit Court for the alleged excessive charges, and which judgment was appealed from to the Court of Appeals of Kentucky, and is now pending, as is shown by the testimony, in the Supreme Court of the United States, on writ of error to the Court of Appeals of Kentucky; because it is shown

of record, and by the evidence introduced in this action, that said shipments were properly interstate shipments, and therefore governed by the Act of Congress Regulating Commerce, approved February 4, 1887, and the various amendments thereto; and hence the action of the railroad company in charging and collecting the rates they did charge and collect, on said shipments was not illegal, but was legal, there having never been any application by the Ohio Valley Tie Company to the Interstate Commerce Commission for a correction of the rates there charged and collected, or for reparation on that account."

But the court overruled each of said motions, to each of which rulings defendant at the time excepted (Record, 55, 56); though subsequently the court in effect sustained the *third* motion, and excluded the testimony concerning the *shipments involved in the other State Court case* (Record, 61).

And the defendant also moved the court to give to the jury the following instructions:

"1. The court instructs the jury that *it can not in this action allow any damages* to plaintiff on account of defendant having charged to and collected from plaintiff unreasonable rates of freight for the carriage of *interstate* shipments of cross-ties" (and at the time defendant offered this Instruction No. 1 it said to the court in writing: In offering this instruction *defendant relies upon the Federal Act to regulate commerce, approved February 4, 1887, and the various amendments thereof, and insists that this court has no jurisdiction to consider or determine whether or not the rate on an interstate shipment of freight is unreasonable, and if so what damage the shipper has been caused thereby, unless and*

until the questions of the reasonableness of the rate and of the amount of damage have been by court* submitted to and heard and determined by the Interstate Commerce Commission).

"2. The jury are instructed that they can not allow plaintiff as damages anything on account of the fact that defendant charged to and collected from it the rate upon fifth class freight for the shipment of cross-ties involved in the action of Ohio Valley Tie Company v. L. & N. R. Co. in the Jefferson Circuit Court, wherein judgment was given in favor of plaintiff for certain alleged excess charges of freight, and which judgment was appealed to the Court of Appeals, and which case was afterwards carried to the Supreme Court of the United States, where it is now pending." (And at the time defendant offered this Instruction No. 2, it said to the court in writing: In moving the court to give the jury this instruction, *defendant relies upon the Federal Act to regulate commerce, approved February 4, 1887*, and all amendments thereof, and insists that it is shown both by the record on the action referred to and in the present action that the shipments of cross-ties referred to in that action were interstate shipments, and that the question of the reasonableness of the rates therein involved had never been submitted to the Interstate Commerce Commission, nor determined by it; *and that this court has no jurisdiction to determine the question of the reasonableness of said rates nor the question of the damages, if any, resulting from charging the same*. And defendant also insists that plaintiff having recovered judgment on account of the charges of rates involved in that action, can not further recover any additional sum herein, based on the same alleged wrongful acts.)

* We think the court will recognize that the words "by court" have gotten into the record by error. They make no sense where they are found.

"3. The court instructs the jury that defendant, Louisville & Nashville R. R. Co. had a right to keep its cars on its own tracks, and it was not therefore guilty of any wrong in refusing to allow its cars to go off its own tracks.

"4. The court instructs the jury that, *under the Federal Act to regulate commerce*, the defendant railroad company was required by said act to charge and to collect from all shippers of interstate traffic the rates of freight fixed by its tariff which was at the time of shipment on file and in effect with the Interstate Commerce Commission at Washington, and it would have been a violation of law to have charged or collected from any such shipper a rate different from that which, at the time of the shipment, was fixed by such railroad company's tariff, then on file with the Interstate Commerce Commission and in effect, *or to have connived at any arrangement whereby the payment of the rate fixed by such tariff should be evaded.*"

The court refused each of said instructions and defendant excepted (Record, 58); though subsequently the court excluded the evidence referred to in the tendered Instruction No. 2 (Record, 61).

The court then gave to the jury elaborate instructions, of which the first was the main one, and was very long. We will not attempt to epitomize it, although we have paragraphed it and designated the paragraphs by letters. This paragraphing and lettering were not done by the court, but we have resorted to it simply for the purpose of clearness. The instruction was as follows:

"A. If you believe from the evidence in this case that the rates on cross-ties *which were found to be unreasonable by the Interstate Commerce Commis-*

sion by its order of April 8, 1912, were, to the extent said rates exceeded the rates then in force on lumber, wilfully and maliciously maintained by defendant with the intent to injure plaintiff's business of buying and selling ties, or with the intent to deter plaintiff from buying ties along the line of defendant's railroad, and that *said rates which were charged plaintiff* were, when so maintained, *known by defendant to be unreasonable to said extent*,

"B. Or that defendant for the purpose of injuring plaintiff's said business or of deterring plaintiff from buying ties along the line of defendant's railroad wilfully and maliciously *failed to furnish cars* requested by plaintiff for the shipment of ties previously offered by plaintiff for shipment at times when it might, by the exercise of ordinary diligence, have furnished cars for said shipments, without interference with the rights of others,

"C. Or wilfully and maliciously, with intent to injure plaintiff's said business, or with intent to deter plaintiff from buying ties along the line of the defendant's railroad, *refused to accept the cars of another carrier tendered by plaintiff*, if any were so tendered, for the shipment of ties when the defendant's own cars were not available for that purpose, and when defendant was accustomed, if it was so accustomed, to accept the cars of other carriers when tendered by other shippers under substantially similar circumstances and conditions,

"D. Or that defendant wilfully and maliciously, with intent to injure plaintiff's business of buying and selling ties or with the intent to deter plaintiff from buying ties along the line of defendant's railroad *refused to permit ties shipped by plaintiff to Louisville in carloads to go forward to points on connecting lines without being unloaded*, and required said ties to be transferred from the cars in or on which they reached Louisville over defendant's line to other cars for forwarding to points beyond Louisville on connecting lines, when defendant was ac-

customed, if it was so accustomed, upon request therefor under substantially similar circumstances and conditions to permit cars which reached Louisville over its lines loaded with ties or other goods shipped by persons other than plaintiff to go forward to other such points without being unloaded,

"E. And that defendant by such act or acts, if any were committed, *did tie up a part of plaintiff's capital or did impair and injure plaintiff's business or credit*, or did injure the cross-ties of plaintiff or subject plaintiff to expense as defined in Instruction No. 4 or cause it to lose time from its business of buying or selling ties,

"F. And if you further believe from the evidence that *by said acts or any of them*, if defendant committed such acts or any of them, the plaintiff's business was damaged,

"G. Then you will find for the plaintiff in such sum of money as you believe from the evidence will reasonably compensate the plaintiff for such injuries, if any were sustained by plaintiff, not to exceed in all the sum of \$100,000.00,

"H. But unless you believe from the evidence that the defendant did maliciously commit the acts or some of them above referred to, and unless you further believe from the evidence that such act or acts if committed, did cause injury or damage to the plaintiff, then you will find for defendant." (Record, 59, 60.)

The court's other instructions were as follows:

"No. 2. In addition to the damages which you, in the event you find for plaintiff, are authorized by Instruction No. 1 to find, you may or may not, in your discretion, also allow plaintiff punitive damages by way of punishment of defendant, but the entire damages awarded shall not exceed \$100,000.00.

"No. 3. By the words 'such sum of money as you believe from the evidence will reasonably compen-

sate the plaintiff for such injuries, if any were sustained by plaintiff,' as used in the first instruction, is meant such sum of money, if any, as the plaintiff lost by reason of any wrongful acts done by defendant as defined in said instruction, if any, by which defendant did tie up plaintiff's capital, or did impair or injure plaintiff's business or credit or did injure the ties of plaintiff or subject plaintiff to expense as defined in Instruction No. 4 or cause it to lose time from its business of buying and selling ties.

"No. 4. In the event you should find for plaintiff under Instruction No. 1, and should find anything on account of expense incurred by plaintiff, the only items of expense on account of which anything can be found are the expense of transferring ties from defendant's cars to other cars and *the fees of attorneys paid by plaintiff for services before the Interstate Commerce Commission*. And in the event you should find anything on account of the expense incurred by plaintiff in transferring ties from defendant's cars to other cars, you will not find on said account any sum in excess of \$771.56.

"And if you should find anything on account of said attorneys' fees, you will not find on said account any sum in excess of \$1,000.00.

"And you will not, in any event, find any sum on account of either of said items of expense in excess of a reasonable charge for the service performed. And if you should find for the plaintiff any sum on account of loss of time, you will not find on said account any sum in excess of \$200.00.

"And if you should find for plaintiff any sum on account of injury to plaintiff's ties, from the failure of defendant to furnish or accept cars for their shipment, you will not find on said account any sum in excess of \$10,000.00.

"No. 5. If you find for the plaintiff, you must not include in your verdict any sum or sums representing the difference or differences between the rate

for hauling lumber and the fifth class rate paid by plaintiff on shipments of cross-ties.

"No. 6. If you find for plaintiff, you will say in your verdict for what sum, and will fix in your verdict separately the amount you find upon any one or more of the several items of damages, upon which you find for plaintiff. If you award punitive damages, you will state the amount thereof separately from any other item of damage you may award.

"If you find for defendant you will say so by your verdict, and no more." (Record, 59-61.)

The jury did *not* find punitive damages, but it found and returned the following verdict:

"We, the jury, find for the plaintiff for the sum:

\$771.56 expense of transferring ties as mentioned in Article No. 4.

\$1,000.00, attorneys' fee.

\$200.00, loss of time and service performed.

\$5,000.00, injury to plaintiff's ties.

\$50,000.00, damage to plaintiff's business and credit as mentioned in Article No. 1." (Record, 46.)

Defendant immediately moved for a new trial on the grounds that the verdict was excessive, and that there were errors in giving and refusing instructions, and in the admission and rejection of testimony, using the general form of alleging these grounds as authorized by the practice in Kentucky (*Meaux v. Meaux*, 81 Ky. 475, 479), and subsequently filed these additional grounds for a new trial, to-wit:

"To require defendant, against its will, to *send its cars out of its possession and off of its tracks* into the possession of another railroad company,

and upon the tracks of another railroad company, is to *deprive defendant of its property without due process of law*, contrary to the provisions of the Constitution of the United States, and especially of the Fourteenth Amendment thereof; and the court's instructions herein in directing the jury that it could allow damages against defendant on account of its refusal to permit its cars to go out of its possession and off its tracks into the possession of another railroad company, and on the tracks of another railroad company, did thus deprive defendant of its property without due process of law, contrary to the said Constitution." (Record, 61.)

The reason for filing this separate and somewhat extended and specific ground for a new trial, in addition to the general grounds of error in giving and refusing instructions, was that when the instruction on this subject of forcing cars out of plaintiff's possession was given, this provision of the Constitution, and this claim that to take these cars out of defendant's possession was to deprive it of its property without due process of law, had not been specially called to the court's attention, either at the time the instruction on that subject was offered by defendant (defendant's Instruction No. 4), or at the time the instruction on that subject was given by the court. And the point was therefore called to the court's attention in this way by this separate ground for a new trial.

The motion for a new trial, however, was overruled, and an appeal was taken to the Court of Appeals of Kentucky, which affirmed the judgment (161 Ky. 212) after which the present writ of error was sued out and allowed.

It would not have occurred to us to discuss in this case the excessiveness of the verdict of the jury but for the fact that counsel for the defendant in error, in a brief heretofore filed, supporting a motion to dismiss or affirm, took occasion to call the court's attention to the opinions both of the trial court and the Court of Appeals on the subject of the amount of the verdict, and in attempted defense of it. It may be excusable, therefore, for us to say this much: The jury's verdict which the court upheld, gave plaintiff \$50,000.00 under the vague designation of "damage to plaintiff's business," *in addition to giving separately every item of damage that plaintiff attempted to prove*. It will be remembered of course that all the alleged excessive freight charges which plaintiff complains it was compelled to pay *have been paid back by the railroad company*. And this verdict of the jury gives plaintiff additionally \$5,000.00 for damages to cross-ties, said to have lain on the ground too long before shipment, and also allows \$1,000.00 attorney's fee for services before the *Interstate Commerce Commission* (as allowed by the court's Instruction No. 4), though it has been expressly held by this court that such an attorney's fee is not recoverable under the Act to Regulate Commerce (*Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, 432); and also allowed it separately for the expense of transferring ties from car to car at Louisville, because defendant would not allow its cars to go through into other States; and also allowed separately for loss of time and service in superintending this work of transfer; and in addition to all of those specific items of damage allowed \$50,000.00 under the

general description of "damage to plaintiff's business and credit." And not only was this grossly excessive, but it can be mathematically demonstrated from this record that the same items of damage have been allowed twice, once specifically and once under the heading, "damage to business." Neither the original petition filed December, 1911, nor either of the two subsequent amended petitions alleged any *permanent* loss of business. Plaintiff's president proved its damage by swearing that for the fiscal year ending September 1, 1911, it made a *profit* of \$27,000.00, and for the next year, ending September 1, 1912, a *loss* of \$28,000.00. He was then asked to "add these two sums together *for the convenience of the jury*" which he did, making \$55,000.00; and the jury gave a verdict for \$50,000.00 for "damage to business"; although, as we have said, all the excess freight charges collected from it have admittedly been *paid back*, and all the extra cost of operation, including even attorneys' fee, and the loss in depreciation of cross-ties left on the ground *were allowed for separately* by the verdict. It might be suggested that the loss in the year complained of was due to a great falling off in *amount of business*. But that explanation is excluded, because the petition alleges that "plaintiff has built up a large and lucrative business, *handling approximately 1,000,000 ties each year*" (Record, 2). And plaintiff's president testified that in the year complained of it "*handled slightly under 1,000,000 ties*" (Record, 64), thus showing that the normal amount of business was done. Then if the *normal amount* of business was done, and all the *extra cost* of handling the

business and *loss in depreciation of material*, due to these alleged wrongs, have been paid, or separately allowed for, it is impossible to conjecture how defendant's action caused plaintiff an *additional loss*, called "damage to business" of \$50,000.00. And this is made all the more difficult to understand when it is seen that plaintiff's business done on that portion of the L. & N. R. R. Co., where the trouble occurred, *only amounted to 18% of its total business*. There are other ways in which money can be lost than by transportation troubles, and if it be true that plaintiff made a profit of \$27,000.00 in the year ending September 1, 1911, and a loss of \$28,000.00 in the year ending September 1, 1912, this was manifestly due to some other cause, or causes, than such as can be charged to defendant; and the *loss on the books* to which plaintiff testified, and which the jury evidently allowed, *undoubtedly included those very same excessive freight charges which the court told the jury it should not allow and the very items of loss and expense which the jury allowed separately*.

ASSIGNMENT OF ERRORS.

The formal assignment of errors will be found in the record, beginning on page 252, but in substance and effect, and for the convenience of discussion, they may be stated as follows:

1. The court erred in holding that it had jurisdiction to render a judgment, and in rendering a judgment, for damages in favor of plaintiff based in part, at least,

on alleged wrongs of defendant in charging excessive rates for the transportation of interstate shipments of cross-ties; and erred in holding, as it did, that plaintiff could make complaint before the Interstate Commerce Commission for wrongs alleged to have been committed by defendant and could pray damage for the same and get an award of damages from the Commission with an order for the payment of same by the defendant, and could collect them from the defendant, and could proceed in the State Court to recover *other and additional* damages on account of the same alleged wrongs, either alone or in connection with other facts.

2. The court erred in affirming the judgment of the Jefferson Circuit Court, and in thereby approving the ruling of that court, whereby it refused to instruct the jury as follows, viz., that the defendant railroad company was required by the Act to Regulate Commerce to charge and collect from all shippers of interstate traffic the rates of freight fixed by its tariff then on file and in effect with the Interstate Commerce Commission, and that it would have been a violation of law for defendant to have charged or collected from any shipper a different rate from that named in such tariff, or to have connived at any arrangement whereby the payment of the rates thus fixed should be evaded.

3. The court erred in affirming the judgment of the Jefferson Circuit Court, thereby holding in effect that it was the duty of the defendant, Louisville & Nashville Railroad Company, to send its cars loaded with cross-ties belonging to plaintiff, Ohio Valley Tie Company, out of

the possession and control of the railroad company, and on to the railroads of other railroad companies, upon demand of the Ohio Valley Tie Company; and that to require this of the defendant did not deprive it of its property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States; and that damages could be awarded against the defendant on account of its refusal to permit its cars to go out of its possession and off its tracks under the circumstances stated.

The formal assignment of errors found in the record is much more detailed and elaborate than what we have just stated; but we have simply here attempted to group the questions for convenience of discussion.

ARGUMENT.

Plaintiff (defendant in error), heretofore made a motion to dismiss or affirm or transfer to the summary docket, which motion, after consideration by the court, was not granted, quite elaborate briefs having been filed upon it by both parties. We do not understand that the action of the court on that motion is conclusive upon it, but it seems to us so absolutely clear from the statement already made that federal questions were properly raised and saved in the State Court, and that this court has jurisdiction, that we can not feel that any argument addressed simply to the question of jurisdiction is necessary.

Some criticism was made in the brief of opposing counsel (on the motion to dismiss) upon the manner of making the federal questions in the State Circuit Court. But the objection to the jurisdiction of that court on account of the provisions of the "Act to Regulate Commerce" was made again and again in terms that could not possibly have been misunderstood, not only by the demurrer to the original petition (Record, 21), but by motions to exclude testimony (Record, 55, 56) and by motions for instructions (Record, 57), any one of which would have been sufficient, for "it is sufficient if it appears from the record that such right was specially set up and claimed in the State Court in such manner as to bring it to the attention of the State Court" (Chicago, Burlington & Quincy R. R. v. Chicago, 166 U. S. 226, 231).

On the motions to exclude testimony and the motions for instructions on the ground that the court, under the Act to Regulate Commerce, had no jurisdiction to determine the damages resulting from unreasonable interstate rates, the argument in support of the motion, or the legal propositions stated as to what the law is, may not always have been stated with entire accuracy or with sufficient fullness, or may have been awkwardly stated, *but the point that that court had no jurisdiction in that case to determine damages resulting from unreasonable interstate rates, and the reliance upon the Act to Regulate Commerce in support of that point were presented to the court in unmistakable terms; and the court was asked on that ground to exclude all testimony as to un-*

reasonable interstate rates, and to instruct the jury that it could not find any damages on that account.

As pertinently said by this court in *Dewey v. Des Moines*, 173 U. S. 193:

“Parties are not confined here to the same arguments which were advanced in the courts below upon a federal question there discussed” (p. 197).

It is true the Court of Appeals said in its opinion that the objection which defendant raised, and now insists upon, to the effect that the Circuit Court had no jurisdiction to allow damages based in whole or in part upon the charging of alleged excessive rates on interstate shipments should have been raised by a “plea in abatement,” pleading the action of the Interstate Commerce Commission. But it is so absolutely manifest that this question could not have been raised by a plea in abatement that it does not seem necessary to dwell upon it.

I.

From the beginning to the end of the suit in the State Court, both the Circuit Court and the Court of Appeals maintained the view that the Interstate Commerce Commission only had jurisdiction, in case complaint should be made before it for a violation of the Act to Regulate Commerce, to award what the court variously designated as “*special*” damages, or “*statutory*” damages, and not what the court called “*general*” damages; and that therefore a shipper claiming to have been injured by some violation of the Act to Regulate Commerce on the part

of a carrier could go before the Commission, and make his complaint, and have the Commission pass upon the question of whether the thing complained of was, or was not, a violation of the Act to Regulate Commerce, and could get an award of these "special" or "statutory" damages from the Commission, and collect them, and could then proceed in a State Court to recover *other and additional* damages, which the court calls "general" damage. That this was the view of the trial court is manifest from its brief opinion heretofore quoted, in which, among other things, it said:

"While the Commission can not award general damage for the enforcement of such extortionate or discriminatory rates, yet it can not be adjudged that general damage has been sustained, until the Commission has determined the rates unreasonable."
(Record, 23.)

And the Court of Appeals in affirming the judgment used this language:

"The State courts retain their common-law jurisdiction and this action is purely of that character, and no attempt is therein made to recover any statutory damage allowed by the Federal Commerce Act."
(Record, 221).

And in the conclusion of its opinion the court thus expressed its view:

"In our opinion, the fact that the Interstate Commerce Commission may have recommended the payment of special damage which flows from violation of a federal law is no reason why the State Court may not take cognizance of a suit based in part upon an-

other result of that act which, when connected with *many other acts* of a different nature, will show a wilful and malicious purpose, and give rise to this common-law cause of action." (Record, 222.)

That the views here maintained of the jurisdiction of the Interstate Commerce Commission, and of the State Court, are entirely erroneous, appears, we think, with entire clearness, not only from the plain language of the Act to Regulate Commerce, but from repeated and very recent decisions by this court.

Sections 8, 9 and 16 of the Act to Regulate Commerce are as follows:

"Sec. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby *for the full amount of damages sustained in consequence of any such violation of the provisions of this act*, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

"Sec. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of *the damages for which such common carrier may be liable under the provisions of this act* in any District or Circuit Court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies,

and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt, etc.

"Sec. 16. That if, after hearing on a complaint made as provided in Section 13 of this act, the Commission shall determine that any party complainant is entitled to *an award of damages* under the provisions of this act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

"If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the Circuit Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State Court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the Commission in the premises. Such suit in the Circuit Court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the Circuit Court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit."

It is difficult to see how language could make a thought any clearer than the language of Sections 8 and 9 make the thought that where a carrier has been guilty of

any violation of the Act to Regulate Commerce, it shall be liable to the person injured "*for the full amount of the damages sustained* in consequence of such violation of the provisions of this act"; and that any person claiming to be thus damaged may make his complaint for the recovery of this damage either before the Commission, or in a Federal Court of competent jurisdiction.

There is nothing here said about "special" damage. No particular character of damage is here defined or described which can be called "statutory damages." The plain English language used is "*the full amount of damages sustained* in consequence of any such violation," etc. And there is no limit upon the jurisdiction of the Commission any more than there is upon the jurisdiction of the Federal Court referred to in Section 9. Either has jurisdiction to allow "the recovery of the damages for which such common carrier may be liable under the provisions of this act," which, as we have seen is "the full amount of damages sustained in consequence of any such violation."

And this plain language has been several times quoted and given its full meaning by this court in late decisions.

Penna. R. R. Co. v. International Coal Co., 230 U. S. 184, was a case where a shipper was complaining that it had been damaged by a discrimination in rates in favor of another shipper; the wrong being, not that the carrier had charged the complaining shipper more than the lawful rates, but that it had charged the favored shipper less. And as this wrong consisted in departing from the rates fixed in the carrier's published tariff, it was a

matter which did not have to be submitted to the Interstate Commerce Commission, but was a plain violation of the Act to Regulate Commerce on the very face of the admitted facts, redress for which any shipper claiming to have been damaged thereby could have in the courts without first going before the Commission. Plaintiff, however, in that case had *failed to prove* that he was *in fact damaged* by the wrongs complained of, or if so, what that damage was. And this, therefore, made it necessary for the court to determine the meaning of the Act to Regulate Commerce as to what could be recovered by anyone complaining of a violation of the act. And on that subject this court, in an opinion by Mr. Justice Lamar, said:

"Making an illegal undercharge to one shipper did not license the carrier to make a similar undercharge to other shippers, and if having paid a rebate of 25 cents a ton to one customer, the carrier in order to escape this suit had made a similar undercharge or rebate to the plaintiff, it would have been criminally liable, even though it may have been done in order to equalize the two companies. For, under the statute, it was not liable to the plaintiff for the amount of the rebate paid on contract coal, but only for the damages such illegal payment caused the plaintiff. The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved they could not be recovered. Whatever they were they could be recovered, because §8 expressly declares that wherever the carrier did an act prohibited or failed to do an act required, it should be "*liable to the person injured thereby for the full amount of*

*damages sustained in consequence of any such violation, * * * together with a reasonable attorney's fee."* (Pages 202, 203.)

The italics in the quotation just made from the court's opinion are the italics of the court, thus showing that the court meant to emphasize the language quoted from the statute that the carrier shall be liable to the person injured "*for the full amount of damages sustained in consequence of any such violation,*" or, as the court expresses it a few lines above in the same quotation referring to these damages, "whatever they were, they could be recovered." We certainly have no power to make this language any plainer than it is.

A later case, however, *Meeker & Co. v. Lehigh Valley R. R.*, 236 U. S. 412, again emphasizes the principle just referred to, and applies it to a state of case more exactly like the case at bar. The *Meeker* case was one in which the shipper was complaining, just as in the case at bar, of the charging of alleged *excessive rates on interstate shipments* (as well as discrimination in favor of another). He went before the Interstate Commerce Commission, and had it to hold the rates to be excessive, and received an award of damages from the Commission, and then brought suit in the Federal Court in Pennsylvania to enforce that award, introducing in evidence the findings of the Commission as to the amount of his damage. It was insisted that the reports of the Commission disclosed that it had applied an erroneous measure of damages. This, therefore, necessitated a consideration by this court of the question of what damages the Commission could

allow. The report of the Commission showed that it had found Meeker & Company to have been damaged to the extent of the difference between what Meeker & Co. had actually paid, and what they would have paid if they had been given the rate which the Commission found would have been reasonable. And after stating this fact the court said:

"In this we perceive nothing pointing to the application of an erroneous or inadmissible measure of damages. The Commission was authorized and required by §8 of the Act to Regulate Commerce to award 'the full amount of damages sustained,' and that, of course, was to be determined from the evidence. If it showed that the damages corresponded to the rebate in one instance and to the overcharge in the other the claimant was entitled to an award upon that basis. The case of *Pennsylvania Railroad v. International Coal Mining Company*, 230 U. S. 184, is cited as holding otherwise, but it does not do so. There a shipper, without proving that he sustained any damages, sought to recover from a carrier for giving a rebate to another shipper, and this court, referring to §8, said (p. 203): 'The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved they could not be recovered. *Whatever they were, they could be recovered.*' There is nothing in either report of the Commission which is in conflict with what was said in that case. On the contrary, the plain import of the findings is that the amounts awarded represent the claimant's actual pecuniary loss." (Page 429.)

Thus these two cases emphasize the plain proposition set forth in the very language of the Act to Regulate Commerce that a complaining shipper, whether he proceed before a Federal Court, or before the Interstate Commerce Commission, with a complaint of a violation of the Act to Regulate Commerce may recover "the full amount of damages sustained" thereby; that all he has to do is to prove what they are; and that *whatever they are, they can be recovered*. We see, therefore, that there is no room left for the suggestion that a shipper proceeding before the Interstate Commerce Commission can only recover what the Kentucky Court of Appeals calls "special" damages, or "statutory" damages, and that he can not recover what that court calls "general" damages.

Applying these principles to the present case it thus appears that when plaintiff went before the Interstate Commerce Commission with its complaint against defendant, it had a right to recover "the full amount of damages sustained" by it in consequence of the violation of the provisions of the Act to Regulate Commerce, of which it complained that the Railroad Company had been guilty. Whatever those damages were, it had a right to recover them before the Commission. We know from plaintiff's own petition, or rather amended petition, in the case at bar, that it complained before the Interstate Commerce Commission of the publication by defendant of exactly the rates on interstate shipments of which it complains in the case at bar; all else, as we have heretofore shown, being incidental to that main complaint. We know that it complained before the Commission of

the publication of these rates, and of their application to particular shipments covering a period of time from May 27, 1910, to April 10, 1911, being from the time the railroad company began to apply its interstate rates to shipments by defendant, down to the time of the filing of the complaint before the Commission, which was on September 15, 1911. (Record, 23, 24.) We are furthermore specifically told by the amended petition that all the *expenses* which it seeks to recover in the present action on account of extortionate interstate rates, and all the *damages* which it seeks herein to recover as a result of the publication of interstate rates, are those expenses and damages resulting from the publication of the identical rates complained of before the Commission; the language of the amended petition on that subject being as heretofore quoted:

“Plaintiff states that all the expenses which it alleged in its original petition that it had incurred on account of the publication by defendant of extortionate interstate rates on ties, and all the damages which it alleged in said petition that it had suffered as a result of the publication of said interstate rates, were incurred and suffered as a result of the publication of said extortionate rates which were condemned by the Interstate Commerce Commission by its said order of April 8, 1912.” (Record, 26.)

In other words, plaintiff went before the Commission with a complaint of the publication and the maintenance and also of the application to specific shipments of the identical rates of which it complains in the case at bar. And as a specific illustration of what is involved in this

statement, we may refer to the fact that in the case at bar, under a separate finding in the jury's verdict, plaintiff recovered a thousand dollars as attorneys' fees (Record, 49) which is shown by Instruction No. 4 of the court, to have been for "Fees of attorneys paid by plaintiff for services *before the Interstate Commerce Commission*" (Record, 60); though it has been expressly held by this court that attorney's fees for services before the Commission are not recoverable as damages under the Act to Regulate Commerce (*Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, 432).

And this situation presents very sharply the question of law now raised by this record. Plaintiff claims that *it is not suing under the Act to Regulate Commerce*, and therefore that, while *under that act* it could not recover as damages money paid out to attorneys for services before the Interstate Commerce Commission, yet *in a State Court* it can recover this as part of what it calls its "general damage" to which it is entitled, as it claims, under its *common-law* cause of action; that it can go before the Commission and get what the Commission will give it, and then go into a State Court and recover something additional.

In that proceeding before the Commission, whatever was *legitimately* recoverable by plaintiff as a consequence of defendant's alleged violation of the act in either publishing, maintaining or applying the rates complained of, could have been recovered. And plaintiff did recover an award of damages before the Commission.

It matters not that the Commission in its order calls this award "reparation." The language of the statute so often quoted is that the party may recover "the full amount of *damages* sustained" (Section 8), or again, "the *damages* for which such common carrier may be liable." (Section 9.) And the language of Section 16 is "That if, after hearing on a complaint made, as provided in Section 13 of this Act, the Commission shall determine that any party complainant is entitled to *an award of damages* under the provisions of this act for a violation thereof, the Commission shall make an order directing the carrier to pay to complainant the sum to which he is entitled on or before a day named." And while the *order* of the Commission filed in this case as an exhibit with the amended petition used the term "reparation" (Record, 29), yet the *report* of the Commission upon which the order was based, uses the language "that complainant has been *damaged* to the extent of the difference between the amount which it did pay and the amount which it would have paid as the rates above set forth as lumber rates." (Record, 99.)

We submit, therefore, that the *State Court* of Kentucky, under the conditions hereinbefore explained, *had no jurisdiction* to give a judgment in favor of plaintiff for damages based in whole or in part upon any of the wrongs complained of by plaintiff before the Interstate Commerce Commission. And in this connection we hope to make plain that we are not hereby making a question as to the right of a plaintiff to split his cause of action, the prohibition of which is made by the ordinary common-

law rules of procedure; and we are not making any question of the necessity for plaintiff to elect between a proceeding before the Interstate Commerce Commission for damages and a proceeding before a Federal Court for damages, as allowed by Section 9 of the Act to Regulate Commerce. The present proceeding was begun in the *State Court*, and we deny that that court has any jurisdiction whatever to give judgment for damages, based either in whole or in part upon acts that were complained of before the Interstate Commerce Commission. And this seems to us to follow by absolute necessity from the language of the Act to Regulate Commerce, and also from the decisions of this court construing and applying the same.

We have already quoted Sections 8, 9 and 16 of the Act, and have specially commented on the provisions of Sections 8 and 9, though not as yet specially on Section 16. We have seen that Section 9 gives a right of election to one proceeding to recover damages for a violation of the act, as to whether he will go before the Interstate Commerce Commission with his claim for damages or before a court of the United States. And this court, in the case of *Mitchell Coal Company v. Pennsylvania Railroad Company*, 230 U. S. 247, has expressly held that the election here given is between the Commission and a Federal Court, and not between the Commission and a State Court. The court saying in that case:

"The plaintiff's cause of action for damages occasioned by the payment of illegal or unreasonable allowances, was one which, under Sections 8 and 9 of the Commerce Act, *could only be brought in a District or Circuit Court of the United States.*" (Page 250.)

And this ruling, as we will presently mention, has been repeated several times since in other cases.

It is true, Section 16 of the Act, under a certain condition of facts, gives a right to proceed in the State Court, but no such condition of facts exists in the case at bar. Section 16, of which we have heretofore quoted the first paragraph, which provides for the Commission making an award of damages and making an order directing the carrier to pay the sum awarded, then says:

"If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant or any person for whose benefit such order was made, may file in the Circuit Court of the United States for the district in which he resides, or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, *or in any State Court of general jurisdiction* having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the Commission in the premises." And proceeds to state that "the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated."

It will be perceived, however, that this section only gives the State Court jurisdiction of a proceeding where there has been an award of damages by the Commission and an order of payment, *and where the carrier has failed*

to comply with the order. When this situation arises, the State Court is given jurisdiction of an action based upon the order which the carrier has failed to comply with. But if the carrier does comply with it, that is the end of the matter. The complaining party has no right to get an award of damages from the Commission and then go into a State Court to recover "other damages."

This is not only the language of the statute, but it is manifestly just. If the shipper elects to go before the Commission and ask an award of damages from the Commission, he should be required to be satisfied if the award made in his favor is complied with. It is true that the carrier is not bound by the award, except in so far as it is merely *prima facie* evidence. He can dispute the award and a trial can be had over the question of damages according to regular procedure; because it neither had a right of election nor exercised a right of election in the matter of going before the Commission. It was simply carried before the Commission by the complainant. And if the carrier is willing to pay the award made by the Commission, the complainant should be required to be satisfied therewith.

This is certainly the plain meaning of the statute, and as just said, is just. It is said, however, that Section 22 of the Act contains a provision that "Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." And reliance is made upon that provision of the statute, it being claimed that the action at bar is a common-law action.

This section of the statute, however, has been under review before this court and has been construed several times, notably in certain quite late decisions. It was first considered in Texas, etc., *R. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, in which the court held that Section 22 did not have the effect of permitting a shipper to sue a carrier in a State Court for damages for charging alleged excessive freight rates on an interstate shipment, although the common law did give a right of action in such a case; the court saying that to give such a construction to the act, would practically destroy one of the main purposes of the act and render many of its provisions practically nugatory. The court, however, has not failed to give any meaning to Section 22. It applied that section and construed it in connection with Sections 8 and 9 in the late case of *Pennsylvania Railroad Co. v. Puritan Coal Mining Co.*, 237 U. S. 121. That was a suit in a State Court seeking damages by a shipper against a carrier for failing to furnish the shipper cars within which to ship his coal. It appeared that the railroad company had a certain rule for distributing cars in times of shortage, and there was no complaint by the shipper of the reasonableness of that rule, but it was complained that the railroad company had not furnished the cars to this shipper which it could have furnished and ought to have furnished under its own rule, and that it was, therefore, guilty simply of the common-law wrong of failing to furnish cars without any excuse. The suit, as just said, was brought in the State Court, and the objection was made that the State Court had no jurisdiction; and in dis-

posing of that question and in holding that the State Court did have jurisdiction, this court reviewed Sections 8, 9 and 22 of the Act. It first quoted Section 9, and then said:

“It will be seen that this section does more than create a right and designate the court in which it is to be enforced. It gives the shipper the option to proceed before the Commission or in the Federal courts. The express grant of the right of choice between those two remedies was the exclusion of any other remedy in a State Court; and that the Federal tribunals have exclusive jurisdiction of a certain class of cases referred to in Section 9 has been recognized in the few decisions dealing with the question. (Citing authorities.)

“This construction is also supported by the legislative history of the statute. For while the Hepburn Act, as a convenience to shippers, permitted suits on *reparation orders* to be brought in the Federal Court of the district where the plaintiff resided or the company had its principal office; and while the Act of 1910 in further aid of shippers, permitted suits on *reparation orders* to be brought in State or Federal courts, it made no change in Sections 8 and 9 which as shown above, gave the shipper the option to make complaints to the Commission or to bring suit in a United States Court.

“But Sections 8 and 9 standing alone might have been construed to give the Federal courts exclusive jurisdiction of all suits for damages occasioned by the carrier violating any of the old duties which were preserved and the new obligations which were imposed by the Commerce Act. And, evidently, for the purpose of preventing such a result, the proviso to Section 22 declared that ‘nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but

the provisions of this act are in addition to such remedies.'

"That proviso was added at the end of the statute, not to nullify other parts of the act, or to defeat rights or remedies given by preceding sections, but to preserve all existing rights which were not inconsistent with those created by the statute. It was also intended to preserve existing remedies, such as those by which a shipper could, in a State Court, recover for damages to property while in the hands of the interstate carrier; damages caused by delay in shipment; damages caused by failure to comply with its common-law duties and the like. But for this proviso to Section 22, it might have been claimed that Congress having entered the field, the whole subject of liability of carrier to shippers in interstate commerce had been withdrawn from the jurisdiction of the State courts, and this clause was added to indicate that the Commerce Act, in giving rights of action in Federal courts, was not intended to deprive the State courts of their general and concurrent jurisdiction. *Galveston, etc., R. R. v. Wallace*, 223 U. S. 481.

"Construing, therefore, Sections 8, 9 and 22 in connection with the statute as a whole, it appears that the act was both declaratory and creative. It gave shippers new rights, while at the same time preserving existing causes of action. It did not supersede the jurisdiction of State courts in any case, new or old, *where the decision did not involve the determination of matters calling for the exercise of the administrative power and discretion of the Commission; or relate to a subject as to which the jurisdiction of the Federal courts had otherwise been made exclusive.*" (Page 128, etc.)

Then coming to apply these principles to the case then before the court, it was pointed out, as heretofore stated, that the shipper was not complaining that the rule of dis-

tribution adopted by the carrier was unreasonable or unfair, but was simply complaining that he had not received sufficient cars to carry his freight, and that there was no excuse for this, because, if the carrier had simply applied its own rule of distribution, the shipper would have received the cars he wanted. And the court, after referring to the cases in which it had been held that where a shipper complains that the carrier's rule of distribution is unfair this must be submitted to the Commission, then said:

"The present suit, however, is not of that nature. It is not based on the ground that the Pennsylvania Railroad's rule to distribute in case of car shortage on the basis of mine capacity was unfair, unreasonable, discriminatory or preferential. But, as shown above, the plaintiff alleged it was damaged by reason of the carrier's failure to furnish it with cars to which it was entitled. In support of that issue of fact the plaintiff relied on the carrier's own rule as evidence. That rule, and the carrier's Distribution Sheets, showed the number of cars to which the plaintiff, the Berwind-White Company and other coal companies in the district, were each entitled. The evidence further showed that the plaintiff did not receive that number of cars to which by rule it was thus entitled. So that on the trial *there was no administrative question as to the reasonableness of the rule, but only a claim for damages occasioned by its violation in failing to furnish cars.* Penna. R. R. Co. v. International Coal Co., 230 U. S. 197. The State and Federal courts had concurrent jurisdiction of such claim against an interstate carrier without a preliminary finding by the Commission." (Page 134.)

Then, shortly after the Puritan Coal Company case, came the case of Pennsylvania Railroad Co. v. Clark Brothers, 238 U. S. 456, which is directly applicable to

the case at bar. In this latter case Clark Brothers, being coal miners, brought a suit in the State Court in Pennsylvania "to recover damages for inadequate and unjustly discriminatory car service and supply." It appeared that the plaintiff had gone before the Interstate Commerce Commission with a complaint on the same subject, and had obtained an award of damages or a reparation order. There was, however, a Pennsylvania statute, which likewise prohibited undue or unreasonable discrimination by a common carrier, and provided that the guilty carrier should be liable "for damages *treble the amount of injury suffered.*" Accordingly, Clark Brothers brought a suit in the State Court, alleging unjust discrimination by the railroad company in the distribution of its cars, and prayed for treble damages under the State statute. And these damages were allowed; and the judgment was affirmed by the Supreme Court of Pennsylvania. It was then brought to this court, the railroad company insisting that the State Court had no jurisdiction—a position which this court upheld—necessarily, therefore, involving again the consideration of Sections 8, 9, 16 and 22, and also a review of the case of Pennsylvania R. R. Co. v. Puritan Coal Co., 237 U. S., *supra*. The court said:

"Where, as in this case, it appears that the act has been violated, and the requisite ruling as to the unreasonableness of the practice assailed has been made by the Commission, *the provisions of Section 9 are applicable.* This section provides (here quoting Section 9):

"This provision defines the remedies to which a person in the situation of the plaintiff is entitled, and the terms of the provision clearly indicate that these remedies are exclusive. The express requirement of an election between the proceeding before the Commission and suit in the Federal Court leaves no room for the conclusion that there is an option in such case to resort to the State Court. Where the proceeding has been had before the Commission and reparation awarded, suit under Section 16 (as amended in 1910) may be brought in either a State or a Federal Court, *but this is after the Commission's award has been made.*

"In *Pennsylvania Railroad v. Puritan Coal Co.*, *supra*, construing Section 9, the court said: 'It will be seen that this section does more than create a right and designate the court in which it is to be enforced. It gives the shipper the option to proceed before the Commission or in the Federal courts. The express grant of the right of choice between those two remedies was the exclusion of any other remedy in a State Court. * * * In *Mitchell Co. v. Penna. R. R.*, 230 U. S. 250, the same view of the statute was taken in discussing another, but related, question. This construction is also supported by the legislative history of the statute. For while the Hepburn Act, as a convenience to shippers, permitted suits on Reparation Orders to be brought in the Federal Court of the district where the plaintiff resided or the company had its principal office; and while the Act of 1910 in further aid of shippers, permitted suits on Reparation Orders to be brought in State or Federal courts, it made no change in Sections 8 and 9, which, as shown above, gave the shipper the option to make complaints to the Commission or to bring suit in a United States Court.' Referring to the proviso in Section 22, with respect to the preservation of existing remedies, it was then pointed out that the proviso was not intended to nullify other parts of the act, but to main-

tain existing rights which were not inconsistent with those which the statute created. And, finally, with regard to a case such as the present one, where the Commission, at the instance of the injured party, has made its ruling as to the unreasonableness or unjustly discriminatory character of the practice attacked, the court thus defined the remedy available: 'Until that body' (the Commission) 'has declared the practice to be discriminatory and unjust, no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. When the Commission has declared the rule to be unjust, redress must be sought before the Commission or in the United States courts of competent jurisdiction as provided in Section 9.' " (Pages 469, 470, etc.)

Then, after referring to certain cases in which it had not been necessary to go before the Commission for any administrative relief, and in which, therefore, this had not been done, the court proceeded:

"The distinction, however, is apparent. In the cases cited the plaintiff had not invoked the jurisdiction of the Commission. In this case it had done so. It went before the Commission, with its complaint under the act, assailing the rule of the company, and it secured from the Commission a finding as to the illegality of the rule and the violation of the act. This proceeding established the character of the claim so far as interstate transactions were concerned, *and it could be prosecuted solely under the Federal statute.* This follows necessarily from the supremacy of the Federal legislation in relation to interstate commerce. So long as the creative provisions of the Federal Act did not appear to be involved, and the wrong was not disclosed in the aspect presented by the Commission's finding, the plaintiff was free to avail itself of *common-law remedies or of those afforded by local statutes.* But

when, as a result of its own insistence upon its Federal right under the act, it appeared that the act had been violated and that the special remedial provisions of the act were applicable, *it was not possible for the plaintiff to ignore the statute it had thus called into play and disregard its provisions for the purpose of measuring relief by local standards.* The Federal statute governed the plaintiff no less than the defendant. *In the situation in which the plaintiff stood after the Commission's finding, that statute determined the extent of the damages it was entitled to recover with respect to interstate sales and shipments, and the plaintiff was not free to seek another remedy in the State Court and there to secure treble damages under the State statute with respect to the same transactions."* (Page 472.)

This case seems to us to be absolutely conclusive of the case at bar. Whatever may have been plaintiff's remedies, either under any State statute or by virtue of any common-law right of action, before applying to the Interstate Commerce Commission for relief under the Act to Regulate Commerce, yet when it did invoke that act and went before the Commission and complained of the publication and maintenance and the application of the identical rates of which it complains in the case at bar, and that Commission acted upon the matter and made an award of damages, then, to repeat the language just quoted from this court's opinion, "that statute determined the extent of the damages it was entitled to recover * * * and the plaintiff was not free to seek another remedy in the State Court."

Again, another statement by the court in the case just mentioned is applicable to the case at bar, because the facts are similar. The court says:

“The fact that the Commission had not made its award of damages at the time the action was brought is immaterial. *The proceeding before the Commission was pending and the plaintiff's right and remedy were fixed by the Federal Act.*” (Page 473.)

We hardly see how it can be necessary to say any more to make this language of the court applicable to the facts in the case at bar after our full statement of those facts. It is true the Court of Appeals says in its opinion in the case at bar that “the instructions of the court prevent an allowance of anything for excess freight or any damage by reason of the act of charging excess freights.” (Record, 219.) But the record simply contradicts that statement, and we hardly know what explanation of the statement to offer. So far from the instructions excluding any allowance on account of excess freights or any damage by reason of the charging of excess freights, the instructions expressly told the jury that they could consider this—in fact it was the most conspicuous feature of the case; and the court not only allowed this, but refused to grant an instruction disallowing it, or to exclude the testimony on the subject.

It is true, the court instructed the jury by its Instruction No. 5 not to include in their verdict any sum or sums representing the difference or differences between the rate for hauling lumber and the fifth class rate paid by plaintiff on shipments of cross-ties (Record, 60), thus telling the jury not to find for plaintiff the sum which the Commission had ordered the railroad company to pay the Tie Company, because the record showed that this

amount had been paid. But this was far from saying to the jury that they should not find for plaintiff *any damages resulting from the fact that defendant had made that unlawful charge*, or maintained those unlawful rates. The contention had been made all through the trial of the case that simply to pay back the amount of the charge, with interest, *did not fully compensate the Tie Company for the injury done its business in tying up its capital*. And the Court of Appeals itself, in its own opinion, had adopted this view, and had called especial attention to this consideration. In giving reasons for its conclusion that the verdict of \$50,000 for mere "damage to business" was not excessive, the court, among other things which it enumerates, says that plaintiff "was also deprived of more than \$12,000 of its invested capital by way of the excessive freight charges withheld by appellant," and then says "*the jury had a right to take these things into consideration and to conclude that simple interest would be poor compensation for capital thus tied up and credit so injured.*" (Record, 216.) And this was the view of the trial court. In its opinion overruling the motion for new trial, and in considering the question of the excessiveness of the verdict, the court commented on the fact that "these charges were enforced by the railroad company against the plaintiff * * * and so plaintiff was kept out of large sums of money by defendant." (Record, 50.) And, accordingly, we see in the court's principal instruction to the jury, Instruction No. 1, the following language bearing upon this particular matter, to-wit:

"1. If you believe from the evidence in this case that the *rates on cross-ties which were found to be unreasonable by the Interstate Commerce Commission* by its order of April 8, 1915, were, to the extent said rates exceeded the rates then in force on lumber, *wilfully and maliciously maintained by defendant*, with the intent to injure plaintiff's business of buying and selling ties, or with the intent to deter plaintiff from buying ties along the line of defendant's railroad, *and that said rates which were charged plaintiff were, when so maintained, known by defendant to be unreasonable to said extent* * * * (enumerating other possible things the jury might find) * * * and the defendant, by such *act or acts*, if any were committed, *did tie up a part of plaintiff's capital*, or did impair or injure plaintiff's business or credit, * * * and if you further believe from the evidence that *by said acts or any of them*, if defendant committed such acts or any of them, the plaintiff's business was damaged, then you will find for the plaintiff in such sum of money as you believe from the evidence will reasonably compensate the plaintiff for such injuries, etc." (Record, 59, 60.)

How it can be said in the face of this language, as the Court of Appeals said, that "the instructions of the court prevent an allowance of any damage by reason of the act of charging excess freights," is incomprehensible to us; and, as said before, this is made all the more emphatic by the fact that when defendant moved the court to exclude from the jury "all testimony to the effect that such rates thus charged were too high or unreasonable or unjust for any reason, and all testimony as to any damage done to the Ohio Valley Tie Company by reason of such charges" (Record 56, Motion No. 2), the court overruled the motion to exclude this testimony. And again, when the defend-

ant moved the court to instruct the jury "that it can not, in this action, allow any damages to plaintiff on account of defendant having charged to and collected from plaintiff, unreasonable rates of freight on the carriage of interstate shipments of cross-ties" (Record, 57), the court overruled this motion. And, as we have seen, the court gave exactly the opposite of this instruction, telling the jury that they *could consider* the act of defendant in charging those unreasonable rates, if they believed this was maliciously done, and that thereby plaintiff's capital was tied up or its credit impaired, and it was thereby damaged.

It will be observed, furthermore, that the court's instruction is not limited as to the *time* within which these unreasonable rates may have been maintained or the supposed damages may have accrued. It covers *any time* when the rates may have been maintained, from the time defendant made known its purpose to enforce them and began to enforce them in May, 1910, more than a year before the application to the Commission, down as long as they were maintained.

We do not know how to make this matter any plainer. Though we may refer to the fact that the plaintiff itself, in great detail in its petition, set forth the fact that the defendant had published these unlawful rates, and made these unlawful charges and gave the details of the shipments upon which it had applied them, beginning in May, 1910, and stated the amount that it had been required to pay out on account of them and the length of time it had been kept out of its money, etc. And its president, on the

witness stand, emphasized all these matters, referring not only to the publication of the tariffs and the maintenance of the rates, but specifically to the fact that so much of plaintiff's money had been taken from it in paying these excessive rates, he commenting on the fact that "they had, all told, in these overcharge claims \$20,000 at one time" (Record, 117), which money, he complained, was kept out of plaintiff's business for a long time; he maintaining that plaintiff could not be compensated by a simple return of the money, with interest, because, as he explained, the company turned its money over at least twice a year.

The law being, as we have shown it is by this court's latest adjudication on the subject in *Pennsylvania Railroad Co. v. Clark Brothers*, *supra*, that when plaintiff applied to the Commission with its complaint, the Federal statute then determined the extent of the damages it was entitled to, and that it was not free to seek another remedy in the State Court, it would seem necessarily to be true that the plaintiff in the case at bar, having applied to the Commission with its complaint of these rates, of their publication, their maintenance and their application, and especially when it has secured an award of damages which has been paid, can not now bring this action in the State Court and set up those same facts as to the publication and maintenance of those same rates, and get "other and additional" damage on account of this same wrong, merely by adding to these allegations of wrong certain other allegations as to other facts. No one can possibly tell how much the jury allowed on account of the publication and maintenance of these high rates, and on account

of plaintiff's being kept out of its money and having its capital tied up, even though eventually paid back with interest, and how much, on the other hand, the jury may have allowed for other things complained of. This is a kind of separation that no one can make.

Furthermore, in the early part of this brief, we have called attention with care to the fact that the other alleged wrongs of which plaintiff complains in the case at bar are only incidental to this chief alleged wrong of maintaining and charging excessive interstate rates on cross-ties. Every other wrong complained of in this case is incident to that main charge, and grows out of the fact that, while those rates were in the tariff filed with the Commission and *were therefore the legal rates by which everybody was bound*, and which everybody was compelled to observe until they should be changed in the manner pointed out by law, plaintiff undertook to evade them, as is indisputably shown by this record, including the testimony of its own president and the opinion of the Court of Appeals; and the other acts of defendant complained of in the petition, other than the charge of the excessive rates, were steps taken by defendant in the effort to enforce its legally published rates and to prevent their evasion by plaintiff.

That those rates were the legal rates, until changed in the manner pointed out by law, is a proposition which, of course, no one will dispute, because it is indisputable. On that subject this court, in *Pennsylvania Railroad Co. v. International Coal Mining Co.*, 230 U. S. 184, said:

"The statute required the carrier to abide absolutely by the tariff. It did not permit the company to decide that it had charged too much and then make a corresponding rebate; nor could it claim that it had charged too little, and insist upon a larger sum being paid by the shipper. (Citing authorities.) The tariff, so long as it was in force, was, in this respect, *to be treated as though it had been a statute, binding as such upon railroad and shipper alike*. If, as a fact, the rates were unreasonable, the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation." (Page 197.)

Therefore, when the plaintiff, the Ohio Valley Tie Company, to use the language of the Court of Appeals, "hit upon a plan," the nature of which we have heretofore seen, and the object of which was manifestly to evade the payment of these rates which it considered unreasonable, by merely making a shift or change in the form of its bills-of-lading, so as to make shipments appear on the face of the bill-of-lading to be simply shipments to Louisville, when in fact they were shipments to points in Indiana, Ohio and Pennsylvania, and were in law and in truth interstate shipments, it did an unlawful act, and the defendant was right in refusing to recognize the subterfuge and in refusing to allow its cars to go through into other States loaded with ties in carrying these shipments, unless the Tie Company would pay the interstate rate; and, as we have seen, it is conceded in this case that the railroad company was always willing to let its cars go through without the necessity for unloading at Louisville, *if the interstate rate should be paid*. Plain-

tiff's president so testifies (Record, 109), and the petition so alleges. (Record, 6.)

And the same thing is true as to the trouble about supplying cars in which to load the ties at points of origin. As we have already seen, the plaintiff's president admits that he never had any trouble on this subject until this controversy arose. (Record, 107, 113, 118.) And the whole reason for that was that the defendant knew, or at least believed, that it had the right to control its own cars, and that its cars could not be taken out of its possession and sent out of the State (*L. & N. R. Co. v. Central Stock Yards*, 212 U. S. 132), while it was thought that possibly foreign cars, cars belonging to other railroad companies, might be taken out of its possession and used in these interstate shipments, without defendant being able to prevent it.

It is said, however, that defendant could have changed these rates in a short time by application to the Commission. That, however, is beside the question. As long as they were not changed, as long as they were the legal rates, plaintiff was bound by them, and *had no right to try to evade them, and defendant was justified in protecting them*. Plaintiff could not resort to an unlawful course and then complain that it was damaged by steps taken by defendant to obstruct that course. The damage was the result immediately and proximately of plaintiff's own wrong. If plaintiff considered the rates unreasonable, its legal course was to complain of them to the Commission and to ask for the damage it had suffered by reason of them, *whatever that damage was*. And in this con-

nection we may add that plaintiff was not confined by the Act to Regulate Commerce to asking that certain specific rates on cross-ties between certain specific points be changed. It could under Section 15 of the Act have applied to the Commission for a *general order* condemning the *classification* of cross-ties in defendant's tariff, and ordering that they carry the same rate as the lumber from which they are made, which plaintiff contends is the true principle that should be adopted. This would have prevented any necessity for frequent applications to the Commission for relief in specific cases, if the rating principle for which plaintiff contends is sound. But plaintiff chose not to adopt this course, as its president admits (Record, 135), but undertook to *evade the tariff*, as heretofore explained.

We repeat it is entirely beside the question to say that *defendant might have changed its tariff*. So plaintiff might have *had it changed*, if plaintiff is right. But *as long as it was in effect*, both plaintiff and defendant were compelled to abide by it, to treat it "as though it had been a statute, *binding as such upon railroad and shipper alike*." (Penn. R. R. Co. v. International Coal Co., 230 U. S. 184, 197, *supra*.)

Again, it is said that the defendant in the trial court did not plead that the award of the Interstate Commerce Commission had been paid. And the Court of Appeals, as we have seen, suggests that this ought to have been pleaded as a matter in abatement. It was not necessary to plead any such thing. *The plaintiff's own petition showed the facts*. Even the original petition showed that

plaintiff had applied to the Commission for relief on account of the publication of these alleged excessive rates (Record, 3, 4), although it showed that the matter was "still undecided." Then when the court held, on defendant's demurrer that no recovery of what the court called "general damage" could be had on account of the charging of these rates, until the Commission should determine whether or not they were unreasonable, plaintiff waited, as we have shown before, until the Commission had decided the case, and then came in by an amended petition and pleaded specifically the fact that it had filed this complaint before the Commission, and stated that the rates there complained of were the same as the rates already complained of in the pending case at bar, and pleaded that the Commission had heard it and decided it and had made an award of damages, and stated exactly what the award was. And when these facts appeared on the face of the petition, they of themselves showed that the State Court had no jurisdiction to give a judgment for damages, based in whole or in part on those same facts. In this connection, we need only repeat again the language heretofore repeated from the case of Pennsylvania Railroad Co. v. Clark Brothers, 238 U. S., where the court said:

"The fact that the Commission had not made its award of damages at the time the action was brought is immaterial. *The proceeding before the Commission was pending, and the plaintiff's right and remedy were fixed by the Federal Act.*" (Page 473.)

And again we may refer to the language in the same opinion, where the court says that after the Commission had made a finding "that statute determined the extent of the damages it was entitled to recover * * * and plaintiff was not free to seek another remedy in the State Court." (Page 472.)

Therefore, when the plaintiff's own petition showed that there was a proceeding pending before the Commission, and showed that the Commission had made a finding and an award of damages, this showed that the State Court had no jurisdiction over the matter.

And in response to the statement that the defendant did not plead that it had *paid the award* or complied with the reparation order, the answer, of course, as suggested by what has just been said is, that this was not necessary to be shown either by plaintiff or defendant in order to show that the State Court had no jurisdiction. And, furthermore, it was, of course, not necessary for the defendant to plead that it had paid the award or complied with the order, *when the petition did not allege that defendant had failed to do so*. If a plaintiff sues on a promissory note, but fails to allege that the defendant has failed to pay it, it is not incumbent upon the defendant to plead that he has paid it. And so here, when the plaintiff alleged the making of the award and the making of the order for payment, but did not allege that defendant had failed to pay, it was not necessary for defendant to allege that it had paid it. The rights of the parties were fixed. And, as heretofore noted, the omission of an allegation that defendant had failed to pay, was not a matter of

oversight by plaintiff, because defendant did pay, as the plaintiff's president on the witness stand admitted. (Record, 133, 134.)

We submit, therefore, on this first question, which, of course, is much the most important question in the case, that the State Court clearly had no jurisdiction to give a judgment for damages, based in whole or in part upon the complaint that defendant had unlawfully maintained, charged or collected unreasonable rates on the interstate transportation of cross-ties, and that the judgment must necessarily be reversed for that reason.

II.

Another error, which involves, however, a consideration quite akin to the question we have just discussed, was the refusal of the trial court to give the following instruction, which defendant asked for, being Instruction No. 4:

“The court instructs the jury that under the Federal Act to Regulate Commerce, the defendant railroad company was required by said act to charge and to collect from all shippers of interstate traffic, the rates of freight fixed by its tariff, which was at the time of the shipment on file and in effect with the Interstate Commerce Commission at Washington; and it would have been a violation of law to have charged or collected from any shipper a rate different from that which, at the time of the shipment, was fixed by said railroad company's tariff then on file with the Interstate Commerce Commission and in effect, or to have connived at any arrangement

whereby the payment of the rate fixed by such tariff should be evaded." (Rec., 58.)

That the proposition of law asserted in this Instruction was and is sound, no one, we presume, will dispute. The strong language we have already quoted from the opinion of this court in the case of Pennsylvania Railroad Co. v. International Coal, etc., Co., 230 U. S. 197, *supra*, covers the question and leaves nothing to be said upon it.

And it seems to us equally as plain that the defendant had a right to have the court give that instruction to the jury in this case; because malice was an essential ingredient of the present case, recognized as such by the instructions which the court gave, and many of the acts which defendant did, in the effort to protect its published tariff and to prevent what it considered were the attempts by plaintiff to evade that tariff, were relied upon by plaintiff in the case as *evidences of malice* as well as elements of damage. While on the other hand, defendant's explanation of those acts was that they were done by it *in the effort to protect its published tariff*; that it was not compelled to recognize the bill-of-lading as conclusive upon the question that those shipments to Louisville were intrastate shipments; that they in fact were interstate shipments, and that the defendant, recognizing that plaintiff was trying to use the defendant's cars in interstate shipments, though only paying the intrastate rates, had refused to let its cars go through into other States, but had insisted upon their being unloaded at Louisville. In other words, the defendant's argument

was that if these shipments were truly intrastate shipments—if the shipments ended at Louisville—then there was no reason why the cars should not be unloaded at Louisville and returned to defendant; and that if, on the other hand, they were in fact interstate shipments, and the cars were desired to carry the ties on through into other States, then the interstate rates ought to be paid. And defendant insisted that what it did in the matter of refusing to allow its cars to go through into other States, in requiring them to be unloaded at Louisville unless the interstate rate was paid, was simply an effort, in good faith on its part, to protect its legal rates while they were in force, and was not done out of malice. Likewise, as to the furnishing of cars for the loading of ties, the defendant's explanation of its refusal to accept foreign cars for loading purposes at points of origin on defendant's line, was that if it loaded the ties into those foreign cars, then when they reached Louisville, those cars would be taken from it and used in these interstate shipments, whereas if it loaded into its own cars, it believed it had the right, under a principle presently to be discussed, to hold on to its cars and to refuse to allow them to go off of its rails, and thus prevent them from being used in what were really interstate shipments, when only intrastate rates had been paid.

But defendant was deprived of the benefit of this argument and this explanation in showing its good faith in doing these acts, because the court refused to give the instruction which was offered and which we have quoted

above. And as the jury were not lawyers, and not advised about the effect of the Act to Regulate Commerce, the jury did not know that the principle set forth in the instruction here offered was true. And they simply looked upon the matter of defendant's refusal to allow its cars to go into other States and its refusal to accept foreign cars for loading ties along its line, as mere additional acts of wilful wrong and as evidence of malice on the part of defendant. We submit, therefore, that it was plain error in the court to refuse to give the instruction offered and above quoted.

III.

The remaining question in the case arises out of the court's refusal to give the following Instruction (No. 3), to-wit:

"The court instructs the jury that defendant, Louisville & Nashville Railroad Company, had a right to keep its cars on its own tracks, and it was not therefore guilty of any wrong in refusing to allow its cars to go off its own tracks." (Record, 58.)

While at the time that instruction was offered the defendant did not make any avowal showing that it was relying on the Federal Constitution, yet this was supplied by the additional ground for a new trial filed before the court, in which defendant said:

"To require defendant, against its will, to send its cars out of its possession and off of its tracks and into the possession of another railroad company, and upon the tracks of another railroad company, is to

deprive defendant of its property without due process of law, contrary to the provisions of the Constitution of the United States, and especially of the Fourteenth Amendment thereof; and the court's instructions herein, in directing the jury that it could allow damages against defendant on account of its refusal to permit its cars to go out of its possession and off its tracks and into the possession of another railroad company and on the tracks of another railroad company, did thus deprive defendant of its property without due process of law, contrary to said Constitution." (Record, 48.)

The motion for a new trial, however, was overruled by the Circuit Court, and the judgment was subsequently affirmed by the Court of Appeals. And while it is true, the Court of Appeals does not refer to this matter in its opinion, yet the judgment could not have been affirmed without deciding adversely to defendant the question just suggested; and that being true, this sufficiently presents the question to this court for consideration and decision. (Chicago Life Insurance Co. v. Needles, 113 U. S. 574, 579; Green Bay, etc., Canal Co. v. Patton Paper Co., 172 U. S. 58, 68; Chicago, Burlington & Quincy R. Co. v. Chicago; 166 U. S. 226, 231, 232.)

The court, by its instructions heretofore quoted, submitted to the jury the following as a possible condition which, if they should find to exist, would give ground for damages:

"Or that defendant wilfully and maliciously, with the intent to injure plaintiff's business of buying and selling ties, or with the intent to deter plaintiff from buying ties along the line of defendant's railroad, refused to permit ties shipped by plaintiff

to Louisville in carloads, to go forward to points on connecting lines without being unloaded, and required said ties to be transferred from the cars in or on which they reached Louisville over its line to other cars for forwarding to points beyond Louisville on connecting lines, when defendant was accustomed, if it was so accustomed, upon request therefor, under similar circumstances and conditions, to permit cars which reached Louisville over its lines loaded with ties or other goods shipped by persons other than plaintiff, to go forward to other such points without being unloaded." (Record, 59.)

So far as concerns the reference in this instruction to any custom by defendant "under substantially similar circumstances and conditions" to permit its cars to go forward without being unloaded, we can simply say, without any fear of contradiction, that there was not a scintilla of evidence offered in the case, *that anyone else than plaintiff had endeavored to evade the tariffs of the defendant*, or that defendant had been called upon in any other case to act upon *such a situation as was here presented*, where it was satisfied, and where we think it is indisputably true under the late decisions of this court, that shipments which the plaintiff was making were interstate shipments, but where it was paying only the intrastate rates, and was endeavoring to use the defendant's cars to accomplish that purpose.

Furthermore, we do not understand that this court has ever held that it is the legal duty of a railroad company to permit its cars to be taken from its possession on to the lines of other companies, merely because it may frequently permit that to be done under conditions which

it considers justify so doing. On the other hand, this court decided exactly to the contrary of that proposition in the case of Louisville & Nashville Railroad Co. v. Central Stockyards Co., 212 U. S. 132. That case was in many respects, so far as the present question is concerned, quite similar to the present case. In that case a suit was brought in a State Court in Kentucky by the Central Stockyards Company against the Louisville & Nashville Railroad Company, seeking to compel the latter to deliver up its cars loaded with livestock to the Southern Railway Company to be transported by the Southern Railway Company to the Central Stockyards Company, the yards of which constituted the livestock depot of the Southern Railway. A judgment was entered for plaintiff granting the prayer of its bill. We quote this court's statement as to part of that judgment, as follows:

"The railroad company was ordered (1) to receive at its stations in Kentucky and 'to bill, transport, transfer, switch and deliver *in the customary way*' at some point of physical connection with the tracks of the Southern Railway, and particularly at one described, all livestock or other freight consigned to the Central Stockyards or to persons doing business there. (2) It was ordered further to transfer, switch and deliver to the Southern Railway at the said point of connection 'any and all livestock or other freight coming over its lines in Kentucky consigned to the Central Stockyards or persons doing business there.' " (Page 141.)

The Court of Appeals of Kentucky affirmed that judgment, as it did the judgment now under consideration, and a writ of error was prosecuted from this court.

Among other things, it was insisted there that the judgment ordering defendant to send its cars out of its possession, even though the Court of Appeals had held that this was required by Section 213 of the Constitution of Kentucky, was a taking of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution. And on that subject this court said:

"It was argued, however, that the requirement that the plaintiff in error should deliver its own cars to another road was void under the Fourteenth Amendment as an unlawful taking of its property. In view of the well-known and necessary practice of connecting roads, we are far from saying that a valid law could not be passed to prevent the cost and loss of time entailed by needless trans-shipment or breaking bulk, in case of an unreasonable refusal by a carrier to interchange cars with another for through traffic. We do not pass upon the question. It is enough to observe that such a law perhaps ought to be so limited as to respect the paramount needs of the carrier concerned, and at least could be sustained only with full and adequate regulations for his protection from the loss or undue detention of cars, and for securing due compensation for their use. The Constitution of Kentucky is simply a universal undiscriminating requirement, with no adequate provisions such as we have described. The want can not be cured by inserting them in judgments under it. The law itself must save the parties' rights, and not leave them to the discretion of the courts as such. (Citing authorities.) It follows that the requirement of the State Constitution can not stand alone under the Fourteenth Amendment, and that the judgment in this respect also, being based upon it, must fall." (Pages 143, 144.)

The only difference between that case and this case on this question is that, in that case a court of equity, by mandatory injunction, ordered the railroad company to deliver its cars out of its possession and into the possession and control of another "in the customary way" for the benefit of the Central Stockyards Company, and justified this judgment by Section 213 of the Constitution of Kentucky, which it construed as requiring an interchange of cars between railroad companies having physical connection; whereas in the case at bar a court of law has given a judgment for damages against that same railroad company, because it refused to pursue that same character of procedure for the benefit of the Ohio Valley Tie Company.

And as this court held in the Central Stockyards case that the effect of the court's action was to deprive defendant of its property without due process of law, in the absence of a valid law providing for the interchange of cars under proper restrictions and regulations, for the protection of the owner of the cars against loss and undue detention of cars, and securing due compensation for their use, and as no such law has been passed or adopted since that decision covering such subject, we can not see why that case is not absolutely conclusive upon that question in the case at bar.

It was contended in the State Court in that case that such interchange of cars was "customary," and it should be mentioned, and we have mentioned, that the instruction of the trial court to the jury in the case at bar submitted to them the question of damages only in the event

they should find defendant was "accustomed," under substantially similar circumstances and conditions, to permit its cars to go forward upon other lines without being unloaded. But it must be observed that the judgment in the Central Stockyards case likewise ordered the cars to be delivered to the connecting carrier only "in the customary way." And there was proof in that case, just as in this case, about the custom of railroads to interchange cars—a fact which the court doubtless knows without proof—there being proof in that case, as in this case, that while railroad companies do very frequently exchange cars, yet they reserve a right not to exchange them, and frequently do refuse to exchange them. And in the case at bar it was shown, as we have already seen, that the Ohio Valley Tie Company was attempting to evade the published tariff of the railroad company, and attempting to use these cars in that effort; there being not a scintilla of evidence from any witness that any other shipper had tried to do that thing, or that there was any occasion for the Louisville & Nashville Railroad Company to refuse an interchange of cars in order to block such an attempt by any one else.

Mr. Milton H. Smith, president of the Louisville & Nashville Railroad Company, was called as a witness by the *plaintiff*, the Tie Company, and was asked about the custom of a railroad company to allow its cars to go upon other lines, and he, plaintiff's witness, explained at length what the practice was—explaining that it allows this in many cases, but that no company allows its cars to leave its line, except with its consent, and when, in the opinion

of the management, its interest will be promoted thereby, and that it would frequently be most disastrous to a railroad company if it could be *required* to allow its cars to go off its lines (Record, 159); and being asked the specific question if he would allow a car, even a car belonging to another company, to be loaded on the line of the Louisville & Nashville Railroad Company and transferred to another company, when he believed that the purpose was to make an interstate statement under the guise of a state shipment, so as to pay only the state rate when the interstate rate was due, he, of course, said that he would not. (Record, 160, 162.)

Counsel for plaintiff, in this connection, rely upon the case of Missouri Pacific Railroad Co. v. Larabee Flour Mills Co., 211 U. S. 612, but we have never been able to understand the application which counsel seem to make of that case to the case at bar. There was no question involved in that case of an attempt to make a railroad company give up its cars and allow them, against its consent, to go out of its possession and control—no question, therefore, so far as we can see it, such as arose in the Central Stockyards case, or now arises in the present case. The facts in the Larabee Flour Mill case were substantially as follows: The main line of the Missouri Pacific and the main line of the Sante Fe Railway crossed each other at right angles in the town of Stafford. The Larabee Flour Mills Company had a flour mill in this town, and there was a track connecting the main line of the Missouri Pacific with the flour mill. There was also a transfer track connecting the main line of the Missouri Pacific with the main line of the Sante Fe, so that cars

could be switched by means of this transfer track from one of these lines to the other. The Missouri Pacific was accustomed to transferring cars from the main line of the Sante Fe by means of this transfer track to industries connected with its own track in the town mentioned. It had been performing this service for the Larabee Flour Mills, just as it performed it for all other persons in the community. A controversy, however, arose between the flour mills and the Missouri Pacific, and the latter refused to further transfer cars from the Sante Fe to the mills, or from the mills to the Sante Fe, whereupon this suit was brought for a mandatory injunction to compel it to do this, and the court upheld the right of the mills company to the injunction.

As said before, therefore, it is immediately manifest from this statement of the facts, that no such question was involved in that case as was involved in the Central Stockyards case or in the present case—no question as to the right to compel a railroad company *to send its own cars off its own rails and into the possession and control of another company*; and we therefore wholly fail to see the application of anything that was said in that case to the case at bar. It is true that the court held in that case that a common carrier is bound to treat all shippers alike, but surely no one denies that general proposition. It is a common-law proposition and is universally admitted. But that is not carried to the extent of holding that because a railroad company sometimes, and when its own convenience permits, suffers its cars to go off its track, into the possession and control of another company, it can be required to do this for *all persons* and under *all con-*

ditions. And it was held, as we have seen in the Central Stockyards case, that this can not be required; just as it has been often held that the fact that a railroad company may waive the prepayment of freight in favor of certain shippers or connecting carriers, and may in fact be accustomed to doing that, does not compel it to waive prepayment in favor of all shippers or carriers. (Little Rock, etc., R. Co. v. St. Louis S. W. R. Co., 63 Fed. 775, 777.) It would be a remarkable situation if a railroad company could be forced by mandamus to send its cars off its lines into the possession of other companies, merely on allegation or proof of the custom of railroad companies to exchange cars, when it might be true that the railroad company needed its own cars, or feared that they would not be returned to it or might be injured, or, as in the case at bar, believed that an effort was being made to use them by a particular shipper to evade its published tariff rates, and to get interstate shipments through by means of those cars, while only paying intrastate rates for the use of them.

CONCLUSION.

For the foregoing reasons we therefore ask that the judgment of the Court of Appeals of Kentucky be reversed.

HELM BRUCE,

Attorney for Plaintiff in Error.

HENRY L. STONE,

Of Counsel.

March 24, 1916.

APR 25 1915
JAMES D. MAHER

CLERK

SUPREME COURT OF THE UNITED STATES

No. **30388**

OCTOBER TERM, 1914.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, - - - - Plaintiff in Error,

versus

OHIO VALLEY TIE COMPANY, - Defendant in Error.

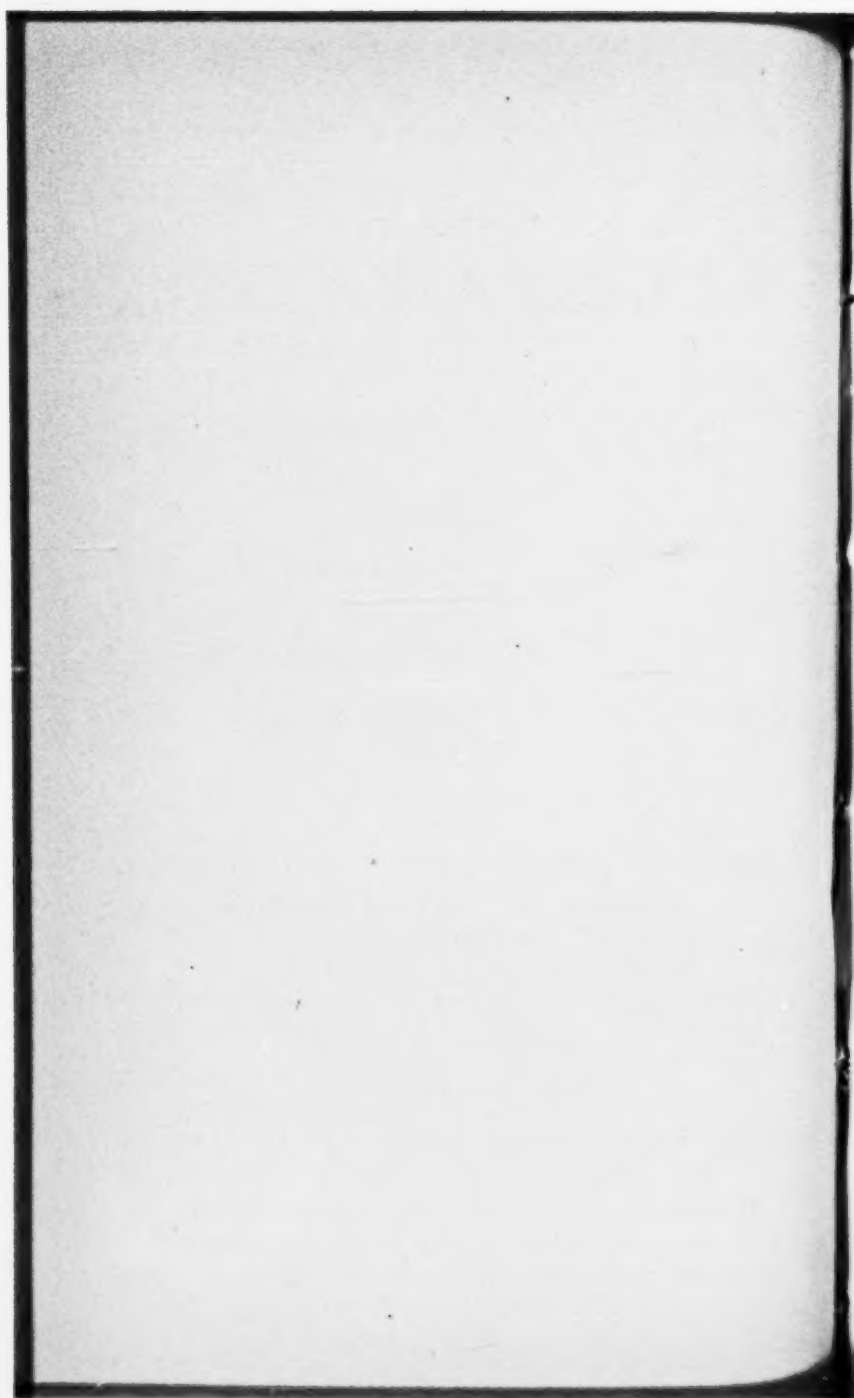
Brief for Plaintiff in Error on Motion to
Dismiss, Affirm or Transfer to
the Summary Docket.

HELM BRUCE,
Counsel for Plaintiff in Error.

HENRY L. STONE,
Of Counsel.

April 12, 1915.

WESTFIELD-BORTE CO., INCORPORATED, LOUISVILLE, KY.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 824.

LOUISVILLE & NASHVILLE RAILROAD COM-
PANY, - - - - - *Plaintiff in Error,*
versus

OHIO VALLEY TIE COMPANY, - - - *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS, AFFIRM OR TRANSFER TO THE SUMMARY DOCKET.

Defendant in error has made a motion either to (1) dismiss this writ for lack of jurisdiction, or (2) affirm the judgment, or (3) transfer the cause to the summary docket. This is a motion by which it takes but little, if any risk. It has everything to win and nothing to lose; while the plaintiff in error has everything to lose and nothing to win. Manifestly it is necessary, therefore, for plaintiff in error to make a much fuller presentation of the case than defendant may consider necessary. Plaintiff's whole case is at stake.

STATEMENT OF THE FEDERAL QUESTIONS.

There are three federal questions presented by this record.

1. One is as to whether or not a shipper, complaining that he has been damaged by a carrier's charging excessive rates on interstate shipments can maintain an action in a *State* Court for such damages; especially where it appears from his own showing that he has filed a complaint on account of these acts before the Interstate Commerce Commission, and has there obtained an award of damages which the carrier has paid; the shipper claiming that the damages which he now seeks are "other or additional" damages, or what he calls "general damages," or damages resulting from the acts complained of before the Commission "in connection with other acts."

2. Another federal question is as to the right of the defendant in this case (the carrier) to have the jury instructed that so long as the rates complained of were in effect (even though ultimately held to be excessive) it was the duty of defendant to demand payment according to those rates and not to connive at any evasion of them.

3. And the third federal question is as to whether or not to require defendant, against its will, to send its cars off its rails and on to the rails and into the possession of another, or to mulct it in damages for a refusal to do so, is to deprive it of its property without due process of law, contrary to the Fourteenth Amendment of the Federal Constitution.

STATEMENT OF FACTS.

The Ohio Valley Tie Company, which we will hereafter refer to as the Tie Company, is engaged in the business of manufacturing, shipping and selling railroad cross-ties. A good deal of its business is done along the line and over the rails of the Louisville & Nashville Railroad Company, which we shall hereafter refer to as the Railroad Company.

As far back as 1869 rates were established by the Railroad Company on cross-ties, which were higher than its rates on lumber (deposition of Mr. Milton H. Smith, Record, 155). And that difference existed from that time down to the institution of this action. From the year 1902—and we did not inquire any further back after specific rates—it appears that the Railroad Company classified cross-ties among the articles embraced in its 5th class (testimony of E. H. Dulaney, Record, 178, 179). Lumber has always been carried under a commodity rate, which is much lower than the 5th class rate in which cross-ties are embraced.

In 1908 the Tie Company began doing business along the line of the Railroad Company in getting out and transporting ties. At this time the situation as to interstate rates, respectively, on cross-ties and lumber, was that which we have just explained, to-wit, that the cross-ties were carried as 5th class, which bore a rate much higher than the commodity rate on lumber. It is claimed, however, that for two years, to-wit, until some time in 1910, the Railroad Company *did not enforce* its published

rate on cross-ties, but allowed them to be transported, and collected for them, under the commodity rate on lumber (testimony of Mr. Bush, President of the Tie Company, Record, 69, 73). Of course if this is true, it was a direct violation of the Act to Regulate Commerce, and the benefit of which the Tie Company received, but which it surely had no right to demand should continue. While the explanation of this violation of the law, if it occurred, is not really material in this case, yet the explanation seems to be found in the fact that during the period in question the bills of lading for the cross-ties, all of which originated in Kentucky, gave Louisville, Ky., as their destination, and it was not known to the Railroad Company that they were in fact interstate shipments, or its attention had not been sharply drawn to the question of whether they were in fact interstate shipments or intrastate shipments (testimony of H. G. Dempf, Local Freight Agent of the Railroad Company at Louisville, Record, 192). But some time during the year 1910 the question was raised as to the character of these shipments, and the Railroad Company became satisfied that they were interstate shipments, and that the interstate rate should be charged upon them, and it charged it and demanded its payment.

The Tie Company then began to resort to a manifest subterfuge in the attempt to evade payment of the interstate rate, by trying to so handle the shipments as to make them appear to be intrastate shipments, and not interstate shipments; it being true that the intrastate rate on cross-ties, due to a ruling of the Kentucky Rail-

road Commission, was the same as the lumber rate, and, therefore, was *lower than the interstate rate* on ties. That the Tie Company did thus attempt to evade the law is practically conceded in this record. Referring to the method of shipping ties to the Nickel Plate Railroad (which has no track at all in Kentucky, Record, 212), Mr. Bush, President of the Tie Company, speaking of the time when the Railroad Company began to demand payment of the interstate rate on ties, says:

“When we received the second settlement showing all cars were now being assessed at the higher rate, *we changed our method of doing business*. We shipped those cars to the Ohio Valley Tie Company, Louisville, Ky., in care of the Big Four Railroad Company, and paid the Louisville & Nashville Railroad Company *freight up to Louisville at the lumber rate and reconsigned the cars to the Nickel Plate.*”

And on cross examination as to what he meant by changing his method of doing business, he was examined and answered as follows:

“Q. The question was what was the change in your method of doing business?

A. Shipped the ties which were intended for the Nickel Plate road in care of the Big Four Railroad in Louisville, and paid the Louisville & Nashville Railroad Company freight to Louisville, and reconsigned the car to Erie, Pa.

Q. The business was practically the same character of business that it had been before, wasn't it?

A. Yes, sir.” (Record, 138.)

In other words, without changing the character of business at all, and when the shipment was admittedly

destined to a point outside of Kentucky, the Tie Company simply resorted to an expedient of consigning to Louisville and then reconsigning to a point beyond, in order to claim that the ties were intrastate shipments, and therefore should pay the intrastate rate, which was the lumber rate, and was lower than the interstate cross-tie rate.

It is true in this connection the Court of Appeals, in its opinion in this case, says that a litigation finally grew out of this question in a State Court in Kentucky, and that on appeal to the Court of Appeals it was held that according to the plan which the Tie Company had "hit upon," the shipments were intrastate (referring to *Louisville & Nashville R. Co. v. Ohio Valley Tie Company*, 148 Ky. 718), and that while a writ of error in that case was taken from the Supreme Court of the United States, yet this was "abandoned and the judgment paid before answering the case at bar." (Record, 212.) There is no basis, however, in this record for the latter statement, and it is not correct. The counsel for the Louisville & Nashville Railroad Company in that case were extremely confident of reversing the judgment of the Court of Appeals, and having this court determine that the shipments of cross-ties made under the circumstances shown by that record were interstate shipments, and therefore of course bore the interstate rate. And they were especially confident of this on account of a decision by this court, in *Texas and New Orleans R. Co. v. Sabine Tram. Co.*, 227 U. S. 111, decided January 27, 1913, after the Court of Appeals' decision, above referred to. But

owing to the fact that the Tie Company had not only brought the suit mentioned in the State Court for the recovery of excess freight charges on the shipments there involved, but had also, in order to guard against the possibility of the court's holding the shipments to be interstate, filed a claim before the Interstate Commerce Commission (as explained by Mr. Bush in the present case, Record, 147), a settlement of that case was finally agreed upon by the parties after the record had been printed (No. 740, October Term, 1912), and pursuant to this agreement the writ of error in that case was dismissed.

We have made this somewhat extended explanation of a brief, but incorrect, statement in the opinion of the Court of Appeals, which puts the Railroad Company in the light of conceding that those shipments were intrastate, and therefore bore the intrastate rate, which it has never conceded, and has never believed, but the opposite of which it has always maintained, and which we think is conclusively settled by *Texas, etc., R'y v. Sabine Tram. Co.*, 227 U. S., *supra*.

We now return to the statement from which we were carried off by the digression just made that, when the Railroad Company in 1910 demanded that on interstate shipments of cross-ties the published interstate rates should be paid, the Tie Company "hit upon a plan"—to use the language of the Court of Appeals—for making it appear that shipments which were actually interstate shipments, should be given the appearance of intrastate

shipments, although, as testified by Mr. Bush, the business was the same as it had been before.

When the Tie Company undertook thus to evade the law by that which was a patent subterfuge, the Railroad Company undertook to enforce its published rates, and to circumvent the attempted evasion of the Tie Company. It said to the Tie Company that if these shipments were, as the Tie Company contended they were, mere shipments to Louisville, then they must be unloaded at Louisville, and that the Railroad Company would not permit its cars loaded with these ties to go through to points beyond the river; although if the Tie Company would concede them to be interstate shipments and pay the published interstate rate upon them, they would be permitted to remain in the cars in which they had been loaded for destination, and would be permitted to *go through* as interstate shipments. That this was said to the Tie Company by the Railroad Company is admitted by the President of the Tie Company (Record, 109).

Of course this was a simple test of good faith. If these ties were really shipments destined to Louisville, there was no reason why they should not be unloaded at Louisville. On the other hand, if they were really shipments destined to a point beyond Louisville, and out of Kentucky, there was no reason why they should not pay the interstate rate. This position, however, taken by the Railroad Company to prevent the evasion of its tariff rate, was regarded by the Tie Company as a great outrage.

Another plan was "hit upon" by the Tie Company. It was believed that the Railroad Company's right to retain its cars and refuse to send them forward with cross-ties destined to points on other roads was confined to *its own cars*, that is, cars to which it had the title. And the Railroad Company therefore, in order to insure its ability to prevent the evasion by the Tie Company of this tariff, required the cross-ties of this particular company, along the Railroad Company's line through the State, to be loaded into cars belonging to the Louisville & Nashville Railroad Company, or, as they are briefly called, "L. & N. cars," because it knew it could control these. The Tie Company then offered to furnish other cars for the loading of its ties, and demanded that they should be accepted and forwarded. But this the Railroad Company refused, for the reason just explained. And this again is insisted upon as a great wrong.

The two positions taken by the Railroad Company, as just explained, to-wit, (1) the refusal to permit its cars loaded with the cross-ties of this company to go through to destinations outside the State, and (2) the insistence that the cross-ties of this company be loaded in L. & N. cars, and not in foreign cars, in order that the Railroad Company might control them, are enlarged upon in this record, both in the evidence and in the instructions of the Circuit Court, and in the opinion of the Court of Appeals, as evidences of malice on the part of the Railroad Company, and as an arbitrary discrimination against the Ohio Valley Tie Company in favor of other shippers generally, because such requirements were not made as to other

shippers. But there is not a scintilla of evidence in the record that any other shipper whose shipments were allowed to go forward to points in other States in the cars in which they were loaded, had attempted, or was in the habit of attempting, to evade the tariff of the Railroad Company by making interstate shipments while contending that they were intrastate shipments.

This controversy finally came to a head in the fall of 1911. On September 14, 1911, the Tie Company brought a suit in equity against the Railroad Company in the Jefferson Circuit Court of Kentucky, seeking a mandatory injunction, commanding the Railroad Company to receive certain cars, when billed in a certain way, and to deliver these cars over to the Pennsylvania Company at Louisville upon tracks controlled by the latter company, upon the payment of *intrastate rates* on the shipments (Record, 6). And on the following day, September 15, 1911, it filed before the Interstate Commerce Commission at Washington a complaint against the Railroad Company, complaining that upon 91 cars of cross-ties shipped from twenty-four different points in Kentucky and Tennessee to various points north of Kentucky, it had been charged excessive rates, the shipments being conceded to be *interstate* shipments (Record, 23, 24). On September 30, 1911, it instituted an action in the Jefferson Circuit Court, seeking to recover certain excess charges on 89 cars of ties which it claimed were *intrastate* shipments. The amount claimed in that case being \$8,009.71 with interest, and in which it ultimately recovered a judgment for \$8,189.91 (including interest), which is the judgment

that was affirmed by the Court of Appeals in 148 Ky. 718, heretofore mentioned, and in which a writ of error was taken from this court, but subsequently dismissed by agreement upon a settlement. And finally on December 9, 1911, the plaintiff brought the present action, in which it referred to all of the foregoing litigation and made many allegations as to alleged wrongs on the part of the Railroad Company, including not only the alleged wrong in charging excessive rates on the ties involved in the suit it had brought in the State Court (which ground of complaint in the instant case was ultimately ruled out and abandoned), but also in charging excessive rates *on the shipments of which it had complained before the Interstate Commerce Commission*. And it also alleged that it had been compelled to employ lawyers both before the Interstate Commerce Commission, and also in the State Courts, and had been compelled to give much time and attention to these matters, and also alleged that by reason of these excessive freight charges it had been deprived of the use of its capital, and that its credit had been impaired, etc., by all of which it was damaged in the sum of \$100,000.00.

Defendant, the Railroad Company, filed a special demurrer to the petition; the demurrer being in two paragraphs. The first paragraph of the demurrer simply made the point that the petition showed on its face that so far as concerned the 89 carloads of cross-ties involved in the State Court case, there was an action pending concerning that alleged wrong, and that plaintiff had no right thus to split its actions against defendant, based

on the same wrongs. That paragraph of the demurrer of course raised no federal question.

The second paragraph of the demurrer, however, was in the following terms:

“Defendant demurs to so much of the petition herein, as complains of defendant’s alleged wrong in publishing in its tariffs for the transportation of interstate freight rates on cross-ties which are alleged to be extortionate and unreasonable; because under the Act of Congress entitled ‘An Act to Regulate Commerce,’ approved February 4, 1887, and its various amendments, the only tribunal having any right or power to give redress against the alleged wrongs complained of is the Interstate Commerce Commission of the United States, and *this court has no jurisdiction to give relief for the aforesaid alleged wrong, or wrongs.*” (Record, 20, 21.)

After argument upon this demurrer the court sustained this second paragraph of the demurrer, but did so pursuant to a written opinion which the court filed, and by which it showed that the ground of its ruling in sustaining that demurrer was only temporary. In this opinion, so far as the second paragraph of the demurrer, to-wit, the paragraph raising the federal question, was concerned, the court said:

“It seems clear that the Interstate Commerce Commission has the exclusive right to determine whether certain interstate rates as published are unreasonable or discriminatory. This is expressly held in *Robinson v. Baltimore, etc., R. Co.* (January 9, 1912), U. S. Sup. Ct. Advance Sheets, October, January, 1911, February 15, 1912, p. 114—*While the Commission can not award general damage, for the*

enforcement of such extortionate or discriminatory rates, yet it can not be adjudged that *general* damage has been sustained, *until* the Commission has determined the rate unreasonable—if the inquiry could be first made by the court, it might be found by the court that the rate was unreasonable, while the Commission who has full power might determine that the rate was reasonable—the allegation of malice can not aid the court's right to inquire as to the reasonableness of the rate." (Record, 22, 23.)

In other words, while the court sustained this demurrer on the ground that the Interstate Commerce Commission must first determine whether or not the rates complained of were unreasonable, before they could be made the basis of any claim for damages, yet the court in fact decided, as shown by its written opinion, that the Interstate Commerce Commission had no power to award what the court calls "general damage," and that such general damage, therefore, must be obtained, if at all, in such an action as this.

After the court made this ruling, plaintiff simply waited until the Interstate Commerce Commission did decide the case which was pending before it. And when that decision was made the plaintiff, in the present case, filed an amended petition in which it stated, with very much more detail and specification than it had used in the original petition, that between May 27, 1910, and April 10, 1911, it had shipped 91 carloads of cross-ties from one point in Tennessee and various points in Kentucky to various points north of Kentucky; that defendant, Louisville & Nashville Railroad Company, had charged to and collected from it, pursuant to its interstate tariff, rates

that were in excess of the lumber rate, and were excessive and unreasonable; that it had filed a complaint before the Interstate Commerce Commission on September 15, 1911, praying that defendant be required to cease and desist from charging these excessive rates, and further praying that defendant be required to make reparation to plaintiff, on account of said unreasonable rates charged for the transportation of said 91 carloads of cross-ties; and that on April 8, 1912, the Interstate Commerce Commission had made an order granting the relief prayed for, a copy of which order was filed as an exhibit (Record, 24).

And the exhibit thus filed, to-wit, the copy of the order of the Commission, reads in part as follows:

"It is ordered, that defendant Louisville & Nashville Railroad Company be, and it is hereby, authorized and directed to pay unto complainant, Ohio Valley Tie Company, on or before the 1st day of July, 1912, the sum of \$6,198.00, with interest thereon at the rate of 6 per cent per annum from April 12, 1911, *as reparation for unreasonable rates charged for the transportation of 91 carloads of cross-ties from Coal Creek, Tenn., to Cincinnati, Ohio, and from points of origin in Kentucky to Louisville, Ky., said ties all being destined to points north of the Ohio River as more fully and at large appears in and by said report of the Commission herein.*" (Record, 29.)

And subsequently on the trial the full report of the Commission, on which this order was based, was read in evidence by plaintiff, in which the Commission says:

"We further find that complainant made the shipments as set forth in the foregoing table and paid

charges thereon at the rates herein found to be unreasonable; *that complainant has been damaged* to the extent of the difference between the amount which it did pay and the amount which it would have paid at the rates above set forth as lumber rates; and that it is therefore entitled to an award of reparation in the sum of \$6,198.00, with interest thereon from the 21st day of April, 1911." (Record, 99).

It will be observed that the amended petition nowhere alleges that this order by the Commission for the payment of this money by the Railroad Company *had not been complied with*. And it could not truthfully have so alleged, because in fact it was complied with, as testified by the president of plaintiff on the subsequent trial of the action (Record, 133, 134).

Defendant did not again demur to the petition after the filing of this amendment, because the court had already in effect ruled in its written opinion heretofore mentioned, that while no complaint could be made of rates until they had been found to be unreasonable by the Commission, yet that the Commission had no power to award such "general damage" as was sought in the present case. And knowing that the question as to what matters complained of in the petition could be made the subject of an action in the State Court, and what not, could be raised upon the trial by objections to testimony or motions to exclude the same, and by instructions on the measure of damages in the action, separating what could be recovered from what could not, the defendant did not repeat its demurrer to the petition, but reserved that question for the trial.

In due course the issues were made up and the case came on for trial, and was heard before a jury. At the conclusion of all of the evidence defendant made the following motions for the exclusion of testimony, to-wit:

"1. Defendant moves the court to exclude and withdraw from the consideration of the jury all testimony of the witness, C. P. Bush, to the effect that on *interstate shipments* of cross-ties the L. & N. Railroad Company charged to and collected from the Ohio Valley Tie Company the rate fixed in its interstate tariff on 5th class freight; *and all testimony to the effect that the rates thus charged and collected were higher than the rates charged on interstate shipments of lumber*; and all testimony to the effect that the rates thus charged and collected on cross-ties *were unreasonably high or unjust*; because, under the Interstate Commerce Law of the United States, the Interstate Commerce Commission alone has the power to determine whether or not a rate charged and collected is *unreasonable*, and the right to determine *what damage*, if any, has been caused to a shipper by the charging of an unreasonable rate, and the fixing of the amount to be paid by the railroad company to a shipper as damages on account of the charging of such unreasonable rate; *and this court has no jurisdiction to consider or determine the amount of damages that shall be charged to a shipper on account of the fact that a railroad company has charged to him and collected from him an unreasonable rate for the carriage of goods in interstate commerce*; and in support of this motion, the defendant relies on the Act of Congress of the United States, ordinarily known as 'An Act to Regulate Commerce,' approved February 4, 1887, and the various amendments thereto.

"2. Defendant moves the court to exclude and withdraw from the consideration of the jury, any and all testimony offered in this case to the effect

that the L. & N. Railroad Company charged to the Ohio Valley Tie Company 5th class rate on cross-ties *moving in interstate commerce*; and any and all testimony to the effect that such rates thus charged were *too high, or unreasonable or unjust* for any reason; and *all testimony as to any damage done to the Ohio Valley Tie Company by reason of such charges*; because under the Interstate Commerce Law, of the United States, to-wit, the Act entitled 'An Act to Regulate Commerce,' passed by the Congress of the United States, and approved February 4, 1887, and the various amendments thereto, the sole right and jurisdiction to determine the question of the *reasonableness or unreasonableness* of a rate charged on interstate freight, and to determine also the question of the *amount of damage* done to a shipper by reason of the charging of an unreasonable rate, is vested in the Interstate Commerce Commission, and *this court has no power to determine such questions.*" (Our italics—Record, 55, 56.)

Each of these motions the court overruled and the defendant reserved exceptions (Record, 56).

Defendant also, at the same time, moved the court to exclude all the testimony as to excessive rates charged on the 89 carloads of ties, which were involved in the action in the State Court, and which were claimed to be intra-state shipments, but which defendant insisted that the record showed were interstate shipments. And the court likewise overruled that motion at that time; but as it subsequently, and before the case was finally submitted to the jury, practically reversed itself and sustained that motion, it is not worth while to notice it here (Record, 56). Thus by these motions to exclude testimony the defendant specially claimed that the court in which this

trial was pending had no jurisdiction to determine that plaintiff was damaged by reason of the alleged charging of unreasonable rates on interstate shipments of cross-ties; and therefore moved the court to exclude all testimony on that subject; and especially relied upon the Federal Act to Regulate Commerce as the foundation of this claim. And the court expressly denied the claim.

Then, not resting alone on these motions to exclude testimony, defendant moved the court to give to the jury the following instructions, which by the first two, covered the point we have thus far mentioned, and by the last two covered two other points, viz.:

"1. The court instructs the jury that *it can not in this action allow any damages to plaintiff on account of defendant having charged to and collected from plaintiff unreasonable rates of freight for the carriage of interstate shipments of cross-ties.* (And at the time defendant offered this Instruction No. 1 it said to the court in writing: *In offering this instruction defendant relies upon the Federal Act to Regulate Commerce, approved February 4, 1887, and the various amendments thereof, and insists that this court has no jurisdiction to consider or determine whether or not the rate on an interstate shipment of freight is unreasonable, and if so what damage the shipper has been caused thereby, unless and until the questions of the reasonableness of the rate and of the amount of the damage have been by court submitted to and heard and determined by the Interstate Commerce Commission.*)

"2. The jury are instructed that they can not allow plaintiff as damages anything on account of the fact that defendant charged to and collected from it the rate upon 5th class freight for the shipment of cross-ties involved in the action of Ohio Valley

Tie Co. v. L. & N. R. R. Co., in the Jefferson Circuit Court, wherein judgment was given in favor of plaintiff for certain alleged excess charges of freight, and which judgment was appealed to the Court of Appeals, and which case was afterwards carried to the Supreme Court of the United States, where it is now pending. (And at the time defendant offered this Instruction No. 2, it said to the court in writing: In moving the court to give the jury this instruction, defendant relies upon the Federal Act to Regulate Commerce, approved February 4, 1887, and all amendments thereof, and insists that it is shown both by the record in the action referred to and in the present action that the shipments of cross-ties referred to in that action were interstate shipments, and that the question of the reasonableness of the rates therein involved had never been submitted to the Interstate Commerce Commission, nor determined by it. *And that this court has no jurisdiction to determine the question of the reasonableness of said rates, nor the question of the damages, if any, resulting from charging the same.* And defendant also insists that plaintiff having recovered judgment on account of the charges of rates involved in that action, can not further recover any additional sum herein, based on the same alleged wrongful acts.)

"3. The court instructs the jury that defendant, Louisville & Nashville R. R. Co. had a right to keep its cars on its own tracks, and it was not therefore guilty of any wrong in refusing to allow its cars to go off of its own tracks.

"4. The court instructs the jury that *under the Federal Act to Regulate Commerce*, the defendant Railroad Company was required by said Act to charge and to collect from all shippers of interstate traffic the rates of freight fixed by its tariff which was at the time of shipment on file and in effect with the Interstate Commerce Commission at Washington, and it would have been a violation of law to have

charged or collected from any such shipper a rate different from that which, at the time of the shipment, was fixed by such railroad company's tariff, then on file with the Interstate Commerce Commission and in effect *or to have connived at any arrangement whereby the payment of the rate fixed by such tariff should be evaded.*" (Our italics, Record, 57, 58.)

The court refused each of these instructions and defendant reserved exceptions (Record, 58), though it is true that while the court overruled the motion to give Instruction No. 2, as to the charges involved in the action pending in the Jefferson Circuit Court, it did subsequently direct the jury to disregard all of the testimony concerning those shipments (Record, 61), and in the instructions which the court did give, it did not authorize the jury to find any damages based on the excessive charges involved in that State Court action (Record, 59).

Thus again, by the instructions which defendant offered, above quoted, the court was expressly asked to instruct the jury that they could not allow any damages on account of defendant's having charged and collected from plaintiff unreasonable rates of freight on interstate shipments; and the Act to Regulate Commerce was expressly named and relied upon as the foundation for that instruction. It may be that the proposition stated, as to the effect of the Act to Regulate Commerce, in giving the reason for the instruction offered, was too broadly stated, or not accurately stated, yet the essential point was made that *on account of the provisions of the Federal Act to Regulate Commerce*, the court should instruct the jury

in that case that it *could not allow any damages on account of charging unreasonable rates on interstate shipments*. We will recur to this matter hereafter.

The court gave the jury elaborate instructions. The first instruction was the main one, and was very long. We will not attempt to epitomize it, though we paragraph it and designate the paragraphs by letters. This paragraphing and lettering was not done by the court, but we have resorted to this simply for purposes of clearness.

The instruction was as follows:

"A. If you believe from the evidence in this case that the rates on cross-ties *which were found to be unreasonable by the Interstate Commerce Commission by its order of April 8, 1912*, were, to the extent said rates exceeded the rates then in force on lumber, wilfully and maliciously maintained by defendant with the intent to injure plaintiff's business of buying and selling ties, or with the intent to deter plaintiff from buying ties along the line of defendant's railroad, and that *said rates which were charged plaintiff* were, when so maintained, *known by defendant to be unreasonable to said extent*,

"B. Or that defendant for the purpose of injuring plaintiff's said business or of deterring plaintiff from buying ties along the line of defendant's railroad wilfully and maliciously *failed to furnish cars* requested by plaintiff for the shipment of ties previously offered by plaintiff for shipment at times when it might, by the exercise of ordinary diligence, have furnished cars for said shipments, without interference with the rights of others,

"C. Or wilfully and maliciously, with intent to injure plaintiff's said business, or with intent to deter plaintiff from buying ties along the line of the defendant's railroad, *refused to accept the cars of another carrier tendered by plaintiff*, if any were so

tendered, for the shipment of ties when the defendant's own cars were not available for that purpose, and when defendant was accustomed, if it was so accustomed, to accept the cars of other carriers when tendered by other shippers under substantially similar circumstances and conditions,

"D. Or that defendant wilfully and maliciously, with intent to injure plaintiff's business of buying and selling ties or with the intent to deter plaintiff from buying ties along the line of defendant's railroad *refused to permit ties shipped by plaintiff to Louisville in carloads to go forward to points on connecting lines without being unloaded*, and required said ties to be transferred from the cars in or on which they reached Louisville over defendant's line to other cars for forwarding to points beyond Louisville on connecting lines when defendant was accustomed, if it was so accustomed, upon request therefor under substantially similar circumstances and conditions to permit cars which reached Louisville over its lines loaded with ties or other goods shipped by persons other than plaintiff to go forward to other such points without being unloaded,

"E. And that defendant by such act or acts, if any were committed, *did tie up a part of plaintiff's capital or did impair and injure plaintiff's business or credit*, or did injure the cross-ties of plaintiff or subject plaintiff to expense as defined in Instruction No. 4 or cause it to lose time from its business of buying or selling ties,

"F. And if you further believe from the evidence that *by said acts or any of them*, if defendant committed such acts or any of them, the plaintiff's business was damaged,

"G. Then you will find for the plaintiff in such sum of money as you believe from the evidence will reasonably compensate the plaintiff for such injuries, if any were sustained by plaintiff, not to exceed in all the sum of \$100,000.00,

"H. But unless you believe from the evidence that the defendant did maliciously commit the acts or some of them above referred to, and unless you further believe from the evidence that such act or acts if committed, did cause injury or damage to the plaintiff, then you will find for defendant." (Record, 59, 60.)

The court also gave to the jury, among others, the following instruction:

"No. 5. If you find for the plaintiff, you must not include in your verdict any sum or sums representing the difference or differences between the rate for hauling lumber and the 5th class rate paid by plaintiff on shipments of cross-ties." (Record, 60.)

The court further instructed the jury that they might find certain expenses and damages to cross-ties, and might find punitive damages; and that if they did find any of those things, they must find them separately. Those instructions, however, are not material here to quote.

The jury found the following verdict:

"We, the jury, find for the plaintiff for the sum:

\$771.56, expense of transferring ties as mentioned in article No. 4.

\$1,000.00, attorneys' fee.

\$200.00, loss of time and service performed.

\$5,000.00, injury to plaintiff's ties.

\$50,000.00, damage to plaintiff's business and credit as mentioned in Article No. 1."

(Record, 46.)

Defendant immediately moved for a new trial on the grounds that the verdict was excessive and that there were errors in giving and refusing instructions, and in the admission and rejection of testimony, using the general form of alleging these grounds as authorized by practice in Kentucky (*Meaux v. Meaux*, 81 Ky. 475, 479) and subsequently filed these additional grounds for a new trial, to-wit:

“To require defendant, against its will, to send its cars out of its possession and off of its tracks into the possession of another railroad company, and upon the tracks of another railroad company, is to deprive defendant of its property *without due process of law*, contrary to the provisions of the Constitution of the United States, and especially of the Fourteenth Amendment thereof; and the court’s instructions herein in directing the jury that it could allow damages against defendant on account of its refusal to permit its cars to go out of its possession and off its tracks into the possession of another railroad company, and on the tracks of another railroad company, did thus deprive defendant of its property without due process of law, contrary to the said Constitution.” (Record, 61.)

The reason for filing this separate and somewhat extended and specific ground for a new trial, in addition to the general grounds of error in giving and refusing instructions, was that when the instruction on this subject of forcing cars out of plaintiff’s possession was given, this provision of the Constitution, and this claim that to take these cars out of defendant’s possession was to deprive it of its property without due process of law, had not been specially called to the court’s attention, either

at the time the instruction on that subject of taking defendant's cars was offered by defendant (defendant's Instruction No. 3), or at the time the instruction on that subject was given by the court. And the point was therefore called to the court's attention in this way by this separate ground for a new trial.

The motion for a new trial, however, was overruled, and an appeal was taken to the Court of Appeals of Kentucky, where the judgment was affirmed, after which the writ of error from this court was allowed by the Chief Justice of the Court of Appeals with supersedeas.

It would not have occurred to us to discuss in this case the excessiveness of the verdict of the jury; but as counsel for defendant in error have invited the court's attention to the opinions both of the trial court and the Court of Appeals on that subject, and have asserted that the verdict is not excessive, it may be excusable for us to say briefly this: The jury's verdict, which the court upheld, gave plaintiff \$50,000.00 under the vague designation of "damage to plaintiff's business," *in addition to giving separately every item of damage that plaintiff attempted to prove*; and not only was this grossly excessive, but it can be mathematically demonstrated from this record that the same items of damage have been allowed *twice*, once specifically, and once under the heading, "damage to business." Neither the original petition, filed December 9, 1911, nor either of the two subsequent amended petitions, alleged any *permanent* loss of business. Plaintiff's president proved its damage by swearing that for the fiscal year ending September 1,

1911, it made a *profit* of \$27,000.00, and for the next year, ending September 1, 1912, a *loss* of \$28,000.00. He was asked to "add these two sums together *for the convenience of the jury*," which he did, making \$55,000.00; and the jury gave a verdict for \$50,000.00 for "damage to business," although all the excess freight charges collected from it have been admittedly *paid back*, and all the extra costs of operation, including even attorney's fees, and the loss in depreciation of cross-ties left on the ground, were *allowed for separately* by the verdict. It might be suggested that the loss of the year complained of was due to a great falling off in *amount of business*. But that explanation is excluded because the petition alleged that "plaintiff has built up a large and lucrative business handling *approximately one million cross-ties each year*" (Record, 2), and plaintiff's president testified that in the year complained of it "*handled slightly under 1,000,000 ties*" (Record, 64), thus showing that the normal amount of business was done. Then if the *normal amount* of business was done, and all the *extra cost* of handling the business and *loss in depreciation of material*, due to defendant's alleged wrongs, have been paid or separately allowed for, it is impossible to conjecture how defendant's actions caused plaintiff an *additional* loss called "damage to business" of \$50,000.00; and this is made all the more difficult to understand where it is seen that plaintiff's business done on that portion of the Louisville & Nashville Railroad, where the trouble occurred, *only amounted to 18% of its total business*. There are other ways in which money can be lost in busi-

ness than by transportation troubles. And if it be true that plaintiff made a *profit* of \$27,000.00 in the year ending September 1, 1911, and a *loss* of \$28,000.00 in the year ending September 1, 1912, this was manifestly due to some other cause or causes than such as can be charged to defendant; and the *loss on the books* to which plaintiff testified, and which the jury evidently allowed, undoubtedly included those very excess freight charges which the court told the jury it should not allow (for they had been repaid), and the very items of loss and expense which the jury allowed separately.

MOTION TO DISMISS.

It should be explained that there is no such thing as an *assignment of errors* on appeal under the Kentucky practice. Such assignment was at one time required, but this provision of the Code was repealed many years ago, and any error committed by the trial court, which is shown by the record of the proceedings in that court, and which is to the substantial prejudice of the losing party, is now brought before the Court of Appeals by simply getting an order allowing an appeal from the final judgment and lodging the record in the clerk's office of that court. And, as neither briefs nor oral arguments are made matters of record, there is no way of showing what matters are argued by counsel, for of course this court will not receive affidavits from a party to show that his counsel had argued certain points orally or by brief, nor from the opposite party that he had not done so.

FIRST FEDERAL QUESTION.

The Court of Appeals in its opinion affirming the judgment of the Circuit Court, says:

"The appellant next offers *as a bar* to the prosecution of this action, the fact that appellee elected to go to the Interstate Commerce Commission with complaint of unreasonable rates, and asked damages on that account. It argues that to permit appellee to recover *other or additional damages* growing out of or incidental to the acts complained of will be a direct violation of the Interstate Commerce Act. To support its contention, it relies upon Section 9 of the Act.

"Section 9. That any person or persons, claiming to be damaged by any common carrier subject to the provisions of this act, may either make complaint to the Commission, as hereinafter provided for, or may bring suit, in his or their own behalf, for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any District or Circuit Court of the United States of competent jurisdiction; but such person or persons, shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

"We do not believe this position is tenable for three reasons: (1) This objection should come by way of a plea in abatement, and (2) the Interstate Commerce Commission as to damages is not a court, and its finding in that regard is evidently (evidential?) merely—neither binding nor conclusive; and (3) the instructions of the court prevent an allowance of anything for excess freight or any damage by reason of the act of charging excess freights." (Record, 218.)

The court here shows that defendant did rely on the Act to Regulate Commerce, but it does not state fully or correctly defendant's position, and from its statement that "this objection should come by way of a plea in abatement," the court shows that it misconceived defendant's position; for it would be impossible for defendant by a *plea in abatement* to make the objection which it did make in the Circuit Court, and in the Court of Appeals, and which it now makes. Sections 8, 9, and 16 of the Act to Regulate Commerce provide as follows:

"Sec. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

"Sec. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act in any District or Circuit Court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two

methods of procedure herein provided for he or they will adopt, etc.

"Sec. 16. That if, after hearing on a complaint made as provided in Section 13 of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

"If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the Circuit Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State Court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the Commission in the premises. Such suit in the Circuit Court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the Circuit Court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit."

Thus we see that by Section 8 of the Act, any common carrier who shall violate its provisions is made liable "for the full amount of damages sustained in consequence of any such violation of the provisions of this act"; and by Section 9 the complaining party may proceed

“for the recovery of the damages for which such common carrier may be liable under the provisions of this act”; which damages, as we have seen by Section 8, is “the *full amount* of damages sustained in consequence of any such violation of the provisions of this act.” And he is given a chance to proceed either before the Interstate Commerce Commission, or in a District or Circuit Court of the United States of competent jurisdiction; the provision being made, however, that he shall not have the right to pursue both remedies, and must elect which one he will pursue.

Thus if the party complaining of damage by reason of a violation of the Act to Regulate Commerce chooses to go in the first place into court, rather than before the Commission, or chooses to go into court before any action is taken by the Commission on the question of damages, he must go into a “District or Circuit Court of the *United States* of competent jurisdiction.” And this court has so declared.

In *Mitchell Coal Co. v. Penna. R. R. Co.*, 230 U. S. 247, the court said:

“The plaintiff’s cause of action for damages occasioned by the payment of illegal or unreasonable allowances was one which, under Sections 8 and 9 of the Commerce Act (24 Stat. 382), *could only be brought in a District or Circuit Court of the United States.*” (Page 250.)

Therefore, under Sections 8 and 9 a *State Court* has no jurisdiction of an action for damages based on what is claimed to be an unreasonable charge for transporta-

tion. Section 16 of the Act, however, by the amendment of June, 1910, does give a State Court jurisdiction of a claim for damages for a violation of the act *under one state of facts*, and that is where the complaining party, exercising the election given him under Section 9, has gone before the Commission with a claim for damages and has been awarded damages, and where the carrier *has not complied* with the Commission's order for payment. In that event, and *in that event only*, can he bring an action in the State Court for damages resulting from a violation of the act. And the petition including the amended petition, in the case at bar *did not allege that condition*, and it is conceded that such condition did not exist, *for the order was complied with*.

Now it seems to us, beyond possibility of controversy that these objections to the proceeding in the case at bar in the State Court *could not appropriately have been raised by a plea in abatement*. The original petition showed that it was seeking damages based in part at least upon actions which were violations of the Act to Regulate Commerce, to-wit, the charging of unreasonable rates for transportation, and while it showed that complaint had been made before the Interstate Commerce Commission, it showed affirmatively that the Commission had not acted upon the complaint. Therefore, the *State Court* had no jurisdiction of the claim for damages, so far as based on those acts of making unreasonable charges for interstate transportation. Manifestly, this objection then was not one to be set up by a plea in abatement. The point was not that another action or proceeding was

pending based on the same cause of action, but the point was that the State Court, as the petition showed, had no jurisdiction at all to give the damages claimed, so far as they were based on the acts just mentioned. Then, when the amended petition was filed, which alleged in detail the facts as to the complaint before the Commission, and which showed that the Commission had made an order for payment of damages on account of the charging of these excessive rates, it did not allege, and could not truthfully have alleged, that the order had not been complied with. And, therefore, the petition did not bring the case within the only condition where a State Court is given jurisdiction of a claim for damages growing out of a violation of the act, to-wit, under Section 16, where the Commission has determined that a complainant is entitled to an award of damages for a violation of the act, and has made an order directing payment, and where the carrier has *failed to comply with the order*.

Manifestly, therefore, this was not a matter to be pleaded in abatement. It was simply a case where the State Court had no jurisdiction to give damages as claimed by the petition or amended petition, so far as based upon the act of charging illegal rates on interstate transportation; and that claim was specially set up at a proper time and in a proper manner.

As has been seen from our statement of facts heretofore made, the Railroad Company insisted, and insisted of record, from the very beginning of this case in the State Circuit Court down to the end of it in the petition for rehearing in the Court of Appeals of the State, that

the court had *no jurisdiction* to give damages as claimed by the plaintiff, *so far as they were based on the alleged violations of the Act to Regulate Commerce*. The arguments or legal propositions stated at the various times when these objections were made, as reasons for insisting that the court had no jurisdiction, may not always have been exact, may sometimes have been too broad, *but the essential point that, under the provisions of the Act to Regulate Commerce, the court had no jurisdiction of the claim for damages based on those acts*, was clearly and distinctly made again and again. And a party is not confined to making always exactly the same argument he may have made at the beginning upon any particular proposition. Thus this court, in *Dewey v. Des Moines*, 173 U. S. 193, speaking of certain questions raised in this court, said:

“If the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the personal judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued.

“Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed.” (Page 197.)

As we have seen, the defendant in its demurrer to the original petition, said:

“Defendant demurs to so much of the petition herein, as complains of defendant’s alleged wrong in publishing in its tariffs for the transportation of interstate freight rates on cross-ties which are al-

leged to be extortionate and unreasonable; because under the Act of Congress entitled 'An Act to Regulate Commerce,' approved February 4, 1887, and its various amendments, the only tribunal having any right or power to give redress against the alleged wrongs complained of is the Interstate Commerce Commission of the United States, *and this court has no jurisdiction to give relief for the aforesaid alleged wrong, or wrongs.*" (Record, 20.)

" It may be that we were incorrect in saying that the Interstate Commerce Commission was the only tribunal having power to give the redress claimed; but we believe we were correct in saying that the court *in which the action was pending* had no jurisdiction whatever to give the relief.

It is true that demurrer was at that time sustained, but, as we have heretofore explained, and as the written opinion then filed showed, merely on the ground that the plaintiff would have to wait until the Interstate Commerce Commission had passed upon the *reasonableness or unreasonableness of the rates*, the court being of the opinion that the Commerce Commission had no power at all to give what the court styles "general damages." (Record, 22, 23.)

Then on the trial, as we have seen, the defendant moved the court to exclude all proof as to unreasonableness of rates, and all proof as to *what damage*, if any, had been caused by charging unreasonable rates; defendant claiming at the time, as shown by the record, that "*this court has no jurisdiction to consider or determine the amount of damages that shall be charged to a shipper on account of the fact that a railroad company has*

charged and collected from him an unreasonable rate for the carriage of goods in interstate commerce"; defendant stating at the time that "in support of this motion, the *defendant relies on the Act of Congress* of the United States, ordinarily known as 'An Act to Regulate Commerce,' approved February 4, 1887, and the various amendments thereto." (Record, 55, 56.)

The proposition here asserted merely as a general proposition, applicable to all cases, may be too broad, but, *as applicable to this case*, if our view of the law is correct, it was true, because, in our view of the law, a State Court has no jurisdiction of a claim for damages resulting from an act which is a violation of the Act to Regulate Commerce, except in that class of cases where the Interstate Commerce Commission has made an award of damages and ordered the payment of damages, and the carrier *has failed to comply with the order*; and in this case the petition itself showed that the Commission had made an award of damages and an order for the payment of money, but *did not show that the carrier had failed to comply with the order*; and, on the contrary, the president of the complainant had affirmatively stated on the witness stand that the award had been paid by the carrier. Therefore, while the proposition asserted in support of the motion to exclude this testimony may have been too broad, or may have been erroneous as a general proposition applicable to all cases, it was true as applicable to this case.

Then, on the motion for instructions, defendant moved the court to instruct the jury that it could not in this

action allow any damages to plaintiff "on account of defendant having charged to and collected from plaintiff unreasonable rates of freight for the carriage of interstate shipments of cross-ties." And defendant at the time said to the court that in support of this motion for instructions it *relied upon the Act to Regulate Commerce*. It is true defendant at that time used the language commented on by counsel for defendant in error, saying: "This court has no jurisdiction to consider or determine whether or not the rate on an interstate shipment of freight is unreasonable, and if so what damage the shipper has been caused thereby, unless and until the questions of the reasonableness of the rate and of the amount of the damage have been by court submitted to and heard and determined by the Interstate Commerce Commission." (Record, 57, 58.) We think the court will recognize that the words, "by court," occurring in this sentence, are an error which in some way has crept into the record. They make no sense and should not be there. And the statement here made that the court has no jurisdiction to consider or determine the reasonableness of the rate, or what damage was thereby caused, unless and until the questions of the reasonableness of the rate and the amount of the damage had been submitted to and determined by the Commission, is inapt and incomplete. The idea that was really intended to be conveyed was simply the same that had been steadily maintained all through the case, viz., that the Commission had the *sole power* to determine (1) the *reasonableness of the rate* and (2) the *amount of the damage*, and

that all a court could do was to *enforce the order of the Commission*; and therefore, as the record in the present case showed the order of the Commission to have been complied with, the court was asked to instruct the jury in the case at bar that it *could not allow any damages whatever on account of the charging of these unreasonable rates*. But, as said before, whether the argument then sought to be made, or the legal proposition in support of the motion for the instruction, was, or was not, accurate or complete, or true as a general proposition applicable to all cases, the claim was distinctly made that, by reason of the provisions of the Act to Regulate Commerce, the court in which the action was pending had no jurisdiction to allow claims for damages based on the charging of these unreasonable rates, and that for that reason the court should instruct the jury not to allow anything on that account.

Thus we see that this claim by defendant that, on account of the provisions of the Federal Act to Regulate Commerce, the court had no jurisdiction in this case to give a judgment for damages, so far as it was based on alleged acts that were in violation of the Act to Regulate Commerce, to-wit, the charging of unreasonable interstate rates, was made from the beginning to the end of the trial in the State Circuit Court, and *this question could not have been made by a plea in abatement*. In fact the Court of Appeals of Kentucky has heretofore in a most elaborate opinion held that there is no such thing in Kentucky as a technical "plea in abatement"; that the only kind of defensive pleading is an *answer*—

Louisville Home Tel. Co. v. Beeler, 125 Ky. 366, 373. But there was no occasion to make the point by any kind of a plea or answer, because the facts appeared on the face of the petition; though even if they had not so appeared, *an objection to the jurisdiction of the court over the subject-matter of an action is never waived by a failure to plead*. Not only is this a general proposition of law, but it is expressly so declared by the Code of Practice of Kentucky, which provides:

“A special demurrer is an objection to a pleading which shows:

1. That the court has no jurisdiction of the defendant or of the subject of the action; or,

2. That the plaintiff has not legal capacity to sue; or,

3. That another action is pending, in this State, between the same parties, for the same cause; or,

4. That there is a defect of parties, plaintiff or defendant. Either of said grounds of objection, shown to exist by a pleading, is waived, unless distinctly specified by a demurrer thereto, *except the objection to the jurisdiction of the court of the subject of the action*, which objection is not waived by failing so to make it; but a party failing so to make it when or before he files a pleading, other than a demurrer, is liable for all costs resulting from such failure.” (Kentucky Code of Practice, Section 92.)

And again:

“118. A party may, by an answer or other proper pleading, make any of the objections mentioned in Section 92, the existence of which is not shown by the pleading of his adversary; and failure so to do is a waiver of any of said objections, *except that to the jurisdiction of the court of the subject*

of the action." (Kentucky Code of Practice, Section 118.)

And as objection to the jurisdiction of a court over the subject of an action is never waived by failure to plead, so the objection that a petition *does not state a cause of action* is never waived by failure to plead. And whether a true statement of the legal situation be that, as to the claim for damages on account of the charging of excessive interstate rates, the *State Court had no jurisdiction* or that the petition simply *did not state a cause of action*—though we think the former is correct—is not material. In either event, the claim was made that there was no right of recovery on account of those acts; and this claim was based expressly on the Act to Regulate Commerce.

AUTHORITIES.

The mere fact that the Court of Appeals of Kentucky in its opinion in this case gives as one of the reasons why defendant's objection can not prevail, that this objection should "come by way of a plea in abatement," does not destroy defendant's right to insist upon its objection in this court. A party's claim to protection under a Federal Act can not thus be taken away from him by a State Court, as many decisions by this court show.

Probably the most strikingly applicable case is *National Mutual B. & L. Assn. v. Braham*, 193 U. S. 635. An action was brought in a State Court of Mississippi to recover interest claimed to have been usurious. Defendant pleaded the general issue and gave notice of what it

expected to prove. Neither in the pleading nor in the notice was any reference to any Federal question. Subsequently defendant offered to amend its notice, the amendment claiming a right under the Fourteenth Amendment to the Federal Constitution; but this amendment was stricken out on the ground that it was filed without leave of court. So far, therefore, as the pleadings, or notice under the pleadings, were concerned, no Federal question at all was made. But at the conclusion of the testimony defendant asked the court for certain *instructions* based in part on its claim of right under the Federal Constitution, which motion for instructions the court overruled. On writ of error from the Supreme Court of Mississippi the defendant in error insisted that *the Federal question had not been properly raised in the court below*, and the Supreme Court of that State *so held*, saying that the proceeding in the lower court was "an ingenious but unsuccessful effort to inject the Federal question into the record." And therefore the court did not pass upon the Federal question. This court, however, held that the Federal question was properly raised and therefore refused to dismiss the writ of error, although it affirmed the judgment on the merits. On the question of jurisdiction the court, by Mr. Justice McKenna, said:

"It is objected that the Federal questions presented can not be considered 'because they were not raised in time and the proper way,' and that the Supreme Court did nothing more than decline to pass on the questions because they had not been raised in the trial court, as required by the State practice.

"The Supreme Court considered that plaintiff in error, by the motions to amend the notice, attempted to 'inject' a Federal question into the record, and that the instruction asked by the plaintiff in error had the same purpose. The court said: 'It was another ingenious but unsuccessful effort to inject the Federal question into the record. If the court had allowed the amended notice and pleas to be filed, which presented nothing on the merits, but simply the alleged Federal question, then there would have been an issue involving the Federal question, to which an instruction would have been appropriate.'

"Upon the ruling of the court upon the amendments to the notice we are not called upon to express an opinion, but, we think, it is very clear that plaintiff in error was entitled to claim rights under the Constitution of the United States based upon the case as presented. And if the rights asserted actually existed, plaintiff in error *was entitled to an instruction* directing a verdict in its favor. The claim was, therefore, made in time. *Green Bay & M. Canal Co. v. Patten Paper Co.*, 172 U. S. 58; *Rothschild v. Knight*, 184 U. S. 334; *Meyer v. Richmond*, 172 U. S. 82; *Mallett v. North Carolina*, 181 U. S. 589; *Dewey v. Des Moines*, 173 U. S. 193. It was also sufficient in form." (Page 646.)

It would be difficult to find a more direct authority upon the question now under consideration than the case just cited. There was a case where there was no allusion to the Federal question in the pleadings; but an instruction was offered, based in part upon a claim under the Federal Constitution. And in this condition of the record the Supreme Court of Mississippi held that the Federal question had not been properly raised *according to Mississippi practice*, and refused to entertain it or decide

it. But this court held that it was properly and sufficiently raised, and entertained jurisdiction.

So in *Rogers v. Alabama*, 192 U. S. 236, a motion to quash an indictment was made in the State trial court, which motion was very long, covering more than two pages of the printed record. The motion was stricken from the files in the State Court. On appeal to the Supreme Court of Alabama a judgment of conviction was affirmed, defendant's exceptions to the action of the court in striking his motion from the files being overruled in the Supreme Court "on the ground that the prolixity of the motion was sufficient to justify the action of the court below," there being a provision in the Code of Alabama that "if any pleading is unnecessarily prolix, irrelevant, or frivolous, it may be stricken out at the costs of the party so pleading, on motion of the adverse party." On writ of error from this court to the Supreme Court of Alabama, it was insisted by the Attorney General of Alabama that the motion to quash the indictment had been disposed of by the Supreme Court of Alabama, *merely on the ground of prolixity without deciding the Federal question*, and that this court, therefore had no jurisdiction. But on that subject this court said:

"We follow the construction impliedly adopted by the Supreme Court of Alabama, and assume that this section" (as to prolixity) "was applicable to the motion. * * * The whole motion takes two pages of the printed record, of the ordinary octavo size. A motion of that length, made for the sole purpose of setting up a constitutional right and distinctly claiming it, can not be withdrawn for prolixity

from the consideration of this court, under the color of local practice, because it contains a statement of matter which perhaps it would have been better to omit but which is relevant to the principal fact averred.

"It is a necessary and well-settled rule that the exercise of jurisdiction by this court to protect constitutional rights can not be declined when it is plain that the fair result of a decision is to deny the rights. It is well known that this court will decide for itself whether a contract was made as well as whether the obligation of the contract has been impaired. *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 443. But that is merely an illustration of a more general rule." (Page 230.)

In *Erie Railroad Co. v. Purdy*, 185 U. S. 148, the court laid down certain principles on this subject which are directly applicable here, in which the court said:

"But the defendant insists that the general allegation in each of its answers, namely, that the statute, besides being void as a regulation of interstate commerce, was in violation 'of various other provisions' of the Constitution of the United States, was sufficient to have enabled him, at the trial, to insist that the statute, upon which the actions were based, was repugnant to the Fourteenth Amendment of the Federal Constitution. *If the answer had contained no such specific allegation, still, if at the trial of the case the defendant had, in stating the grounds of his motion for nonsuit, or in some other way, distinctly claimed that the statute, on which the actions were based, was inconsistent with that amendment, then it would have been the duty of the Court of Appeals to determine the question so raised, unless it was waived by the defendant when the case was before that court, or unless its determination could properly be and was placed upon some ground*

of local or general law adequate to dispose of the case. We state the matter in this way because, as said in *Carter v. Texas*, 177 U. S. 442, 447, 'the question whether a right or privilege, claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a State Court, *is itself a Federal question*, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the State.' (Page 152.)

It is true that the language which the court here quotes from *Carter v. Texas*, refers to whether or not the right or privilege "was distinctly and sufficiently *pleaded* and brought to the notice of a State Court," but it has often been held that it is not essential that the claim be "pleaded" in the technical sense of the term pleading. The very case from which we have just quoted, to-wit, *Erie Railroad Co. v. Purdy*, in the very language we have just quoted, says that if the *answer* had contained *no allegation of this claim*, yet if at the trial of the case the claim had been distinctly asserted, it would have been the duty of the State Court to pass upon it. And in fact in *Carter v. Texas* itself, where the term "pleaded" is used, the question had not been made by a technical pleading, but by a motion to quash an indictment on the ground of the improper impaneling of the grand jury which found it.

In *Mutual Life Ins. Co. v. McGrew*, 188 U. S. 291, the court said:

"Our jurisdiction of this writ of error is asserted under the third of the classes enumerated in Section 709, and it is thoroughly settled that in order

to maintain it, the right, title, privilege or immunity relied on must not only be specially set up or claimed, but at the proper time and in the proper way.

"The proper time is in the trial court whenever that is required by the State practice, in accordance with which the highest court of a State will not revise the judgment of the court below on questions not therein raised. (Citing authorities.)

"The proper way is by pleading, *motion, exception, or other action, part*, or being made part, of the *record*, showing that the claim was presented to the court." (Page 308.)

In several of the cases already cited it is shown that it is not necessary that the Federal question be presented by a *pleading*. And in *Swearingen v. St. Louis*, 185 U. S. 38, the court expressly says it does not mean to hold that it is necessary to *plead* the claim of Federal right, the court saying:

"We do not hold it was necessary to *plead* the claim in order to show it was specially set up, but it must have been so referred to and mentioned as to show that it was present in the minds of the parties claiming the right, or must have been in some way presented to the court." (Pages 45, 46.)

In *St. Louis & Iron Mountain R'y v. Taylor*, 210 U. S. 281, the question as to proper construction of a Federal Act was raised on *motion for instructions*, and this court said:

"There can be no doubt that the claim made here was specifically set up, claimed, and denied in the State Courts." (Page 293.)

Reference is made in the brief in support of the motion to dismiss to the case of Louisville & Nashville Railroad v. Woodford, 234 U. S. 46, in which a writ of error to the Court of Appeals of Kentucky was dismissed; the Court of Appeals having held that the Federal question was not raised on the record in the Circuit Court. But a mere reading of the facts of that case will show it has no bearing upon this one. Woodford had sued the railroad company for damages resulting from an injury to horses shipped from Kentucky to Mexico. In the course of the litigation the bill of lading was filed and was subsequently introduced in evidence. Not only was no reference made in any pleading to any Federal question arising on this bill of lading, but there was no suggestion of such a question on the trial, either by objections to testimony or motions to exclude, nor in the motion for instructions. And among the instructions which the defendant itself had asked for was one to the effect that if the jury should find for plaintiff, it should fix the damages at the fair market value of the horses killed. A verdict was found for plaintiff in a large amount, \$15,000.00. A motion for a new trial was then made, and no reference made in this motion to any Federal question. But in the order overruling the motion for a new trial, there was a recital that the court had heard the defendant upon the Federal question as to whether or not the bill of lading was in violation of the Act of Congress, and that the court was of the opinion that the contract did not violate the provisions of the Act of Congress. An appeal was taken to the Court of Appeals of Ken-

tucky, and there the question was raised that the rulings of the Kentucky courts, to the effect that limited valuation clauses in contracts of shipment are void, are in violation of Section 20 of the Carmack Amendment to the Act to Regulate Commerce, and therefore that the recovery in this action ought to have been limited to certain small amounts fixed in the bill of lading, although, as we have already seen, defendant itself had asked an instruction that if the jury should find for the plaintiff, the damages should be fixed at the *fair market value of the horses killed*. On this condition of the record the Court of Appeals said:

“In view of the fact that the question had been nowhere raised by the pleadings, instructions, or motion for a new trial, or by a motion of any kind, we must conclude that it was raised orally, and was discussed as an academic question.”

And again the court said:

“The futility of appellant’s attempt to raise the question, for the first time, and orally, upon the argument of the motion for a new trial, will be easily realized if we should conjecture what order the court could or would have entered, in case it had been of a contrary opinion, to-wit, that the bill of lading did violate the provisions of the Interstate Commerce Act. It could not have sustained the motion for a new trial, because it was confined to grounds specified. (Citing authorities.) Neither could it have given judgment for the appellant upon the pleadings and notwithstanding the verdict, because no Federal question was suggested by the pleadings. At most, the Federal question was merely raised and discussed academically, after the trial

had been completed, and at a stage of the proceedings too late to bring it before this court." (L. & N. R. Co. v. Woodford, 152 Ky. 409, 410.)

Of course this statement by the Court of Appeals as to the condition of the record in that case shows that the decision in that case can have no application whatever to the case at bar.

Furthermore it is to be observed that the Court of Appeals did actually decide that the State Court, in the case at bar, did have the right to allow damages *in addition to the damages allowed by the Interstate Commerce Commission*, referring to those as "special," or, again, "statutory" damages, whereas those in the case at bar are referred to as "general damages."

In other words, the Court of Appeals did in fact deny the claim of defendant under the Act to Regulate Commerce, which it had specially set up, although the court did say "this objection should come by way of a plea in abatement." And in this connection we may call attention to the fact that in *Mitchell v. Clark*, 110 U. S. 633, where it was insisted that the Supreme Court of Missouri had held a certain plea to be bad on account of the form of the pleading, this court said that, while it was true the opinion of the Missouri Supreme Court had mentioned this objection "*en passant*," yet it had not decided that to be sufficient to invalidate the plea, and had in fact discussed the defense sought to be made by the plea on its merits, and had decided it; this court saying, furthermore, that the question of whether or not a

plea sets up a sufficient defense under an Act of Congress is a question of Federal law. (Page 645.)

We submit, therefore, in conclusion on this point that the Federal question we have been considering was properly raised in the State Court.

SECOND FEDERAL QUESTION.

Defendant asked of the trial court the following instruction, viz.:

"The court instructs the jury that defendant, Louisville & Nashville Railroad Company, had a right to keep its cars on its own tracks, and it was not therefore guilty of any wrong in refusing to allow its cars to go off its own tracks." (Record, 58.)

This instruction the court refused, and defendant excepted to the ruling. (Record, 58.) The court then gave certain instructions in which it told the jury that it might find damages if it should find, among other things, that defendant "refused to permit ties shipped by plaintiff to Louisville in carloads to go forward to points on connecting lines without being unloaded," if it was accustomed to do this for other persons under similar circumstances and conditions (Record, 59). And to this instruction defendant objected and excepted (Record, 59). Then, one of the grounds of the motion for a new trial was as follows:

"To require defendant, against its will, to send its cars out of its possession and off of its tracks into the possession of another railroad company, and upon the tracks of another railroad company, is to

deprive defendant of its property without due process of law, contrary to the provisions of the Constitution of the United States, and especially of the Fourteenth Amendment thereof; and the court's instructions herein in directing the jury that it could allow damages against defendant on account of its refusal to permit its cars to go out of its possession and off its tracks into the possession of another railroad company, and on the tracks of another railroad company, did thus deprive defendant of its property without due process of law, contrary to said Constitution." (Record, 61.)

Here was a right or claim under the Federal Constitution specially set up, and which the court denied in overruling the motion for a new trial.

It is true that the opinion of the Court of Appeals does not mention this question; but it affirmed the judgment, and the judgment could not have been affirmed without denying the right thus claimed by the defendant; because if the court had decided in favor of that right, it would necessarily have reversed the judgment of the Circuit Court.

In the practice of Kentucky, as we have stated, there is no such thing as an assignment of errors on appeal from a Circuit Court to the Court of Appeals; so that any error made by the lower court, which substantially affects the rights of the losing party, and which appears upon the record, is ground for reversal by the Court of Appeals.

And this court has in many cases held that where a Federal question was necessarily involved in an appeal to the highest court of a State, and where the court could

not have decided the case as it did without deciding against the Federal right thus claimed, the Federal right has been denied by the judgment of that court, although it may not have mentioned the question in its opinion; and that this court, therefore, has jurisdiction. This proposition has been so often announced by the court as to make it hardly excusable to cite authorities upon it, though one or two may be mentioned.

In *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, the court said:

“The Supreme Court of Illinois did not, in terms, pass upon the claim distinctly made there, as in the court of original jurisdiction, that the statutes in question were in derogation of rights and privileges secured to appellant by the Constitution of the United States. But the final judgment necessarily involved an adjudication of that claim; for, if the statutes upon the authority of which alone the auditor of State proceeded, are repugnant to the National Constitution, that judgment could not properly have been rendered. This court, therefore, has jurisdiction to inquire whether any right or privilege protected by the Constitution of the United States, has been withheld or denied by the judgment below.” (Page 579.)

So in *Green Bay, etc., Canal Co. v. Patten Paper Co.*, 172 U. S. 58, the court said:

“As then in its cross-complaint, the Canal Company explicitly set up and claimed, as the foundation of its alleged rights, the acts of Congress and the transactions between the United States and the Canal Company, under which the United States became the owner of the dam, canal and other improvements on the Fox River, and the Canal Company be-

came vested with its rights in the surplus water power incidental to said works, and as, in the final judgment, the Supreme Court of Wisconsin *necessarily* held adversely to these claims of Federal right, we hold that the motion to dismiss for want of jurisdiction must be overruled, and that it is our duty to inspect the record in order to see whether there was error in the rulings of the court below." (Page 68.)

In Chicago, Burlington, etc., R. Co. v. Chicago, 166 U. S. 226, the court said:

"It is true that the Supreme Court of Illinois did not in its opinion expressly refer to the Constitution of the United States. But that circumstance is not conclusive against the jurisdiction of this court to re-examine the final judgment of the State Court. The judgment of affirmance *necessarily* denied the Federal rights thus specially set up by the defendant; for that judgment could not have been rendered without deciding adversely to such claims of right." (Pages 231, 232.)

Of course the judgment of the Circuit Court in the case at bar and that of the Court of Appeals affirming it, could not have been entered without denying the claim of defendant that to take its cars out of its possession and deliver them to another person, over its objection, or to subject it to damages because it refused to allow its cars thus to be taken from its possession, deprived it of its property without due process of law, contrary to the Federal Constitution.

Therefore, unless the court shall overrule the cases we have cited, and many others of similar kind which might be cited, holding that the State Court will be consid-

ered as having denied a claim of Federal right where the judgment which it did enter could not have been entered without denying that claim, and shall refuse to consider any Federal question, unless the opinion of the State Court considers it, or unless the court is to adopt the practice of hearing evidence as to what questions were argued orally or by brief in the State Court, where the practice is such as in Kentucky, in which there is no assignment of errors on appeal, then it must be indisputably true that the Federal question of which we are now speaking is before this court for consideration.

Counsel for defendant in error say we did not refer to this question in the petition for rehearing in the Court of Appeals. But what of that? There is no law requiring a party to file a petition for rehearing at all, and certainly there is no law requiring him to embrace in a petition for hearing *everything* that was before the court for consideration originally.

THIRD FEDERAL QUESTION.

At the conclusion of the evidence defendant moved the court to give the jury the following instruction:

“The court instructs the jury that under the Federal Act to Regulate Commerce the defendant Railroad Company was required by said act to charge and to collect from all shippers of interstate traffic the rates of freight fixed by its tariff which was at the time of shipment on file and in effect with the Interstate Commerce Commission at Washington, and it would have been a violation of law to have charged and collected a rate different from that which at the

time of the shipment was fixed by such railroad company's tariff, then on file with the Interstate Commerce Commission, and in effect, or to have connived at any arrangement whereby the payment of the rate fixed by such tariff should be evaded."

The court, however, refused this instruction and the defendant excepted to the ruling of the court. (Record, 58.)

When we come to consider the motion to affirm, we will explain the relevancy and the great importance to defendant of the instruction here asked for. We now simply call the attention of the court to the fact that this instruction was asked for and that the right to have it was expressly based on the provisions of "The Federal Act to Regulate Commerce."

What we have said about the preceding, or second Federal question, is applicable to this. It was distinctly made in the Trial Court, and although not noticed in the opinion of the Court of Appeals that court could not have affirmed the judgment of the Trial Court without denying defendant's right to have the instruction which it here asked for under the Act to Regulate Commerce.

MOTION TO AFFIRM.

But it is said that if Federal questions are raised on the record they are frivolous and not worthy of argument. We have stated what they are in discussing the motion to dismiss.

DAMAGES FOR CHARGING EXCESSIVE FREIGHT RATES.

One of the grounds given by the Court of Appeals for overruling the objection made by defendant to the judgment permitting plaintiff to recover damages on account of excess freight charges was that—

“The instructions of the court prevent an allowance of anything for excess freight or any damage by reason of the act of changing excess freights.”
(Record, 219.)

In other words, the court, in effect, held that no question arose as to whether or not plaintiff could recover in this case any damage by reason of having been charged excessive freight rates, because said the court, the trial court excluded that from the consideration of the jury by its instructions. It is difficult to understand how such a statement can be made upon this record. It is true the court instructed the jury, by its Instruction No. 5, that they must not include in their verdict “any sum or sums representing the difference or differences between the rate for hauling lumber and the 5th class rate paid by plaintiff on shipments of cross-ties” (Record, 60), thus telling the jury not to find for plaintiff the sum, if any, which the Commission had ordered the Railroad Company to pay the Tie Company, and which the record showed had been paid. But this was far from saying to the jury that they should not find for plaintiff *any additional damages resulting from the fact that defendant had made that unlawful charge*. The contention had been made all through the trial of the case that simply

to pay back the amount of the charge with interest did not fully compensate the Tie Company for the injury done its business by tying up its capital and impairing its credit. And the Court of Appeals itself in its opinion had adopted this view, and called special attention to this consideration. In giving reasons for its conclusion that the verdict of \$50,000.00 for mere "damage to business" (which was in addition to a number of special items found by the jury) was not excessive, the court, among other things which it enumerates, says that plaintiff "was also deprived of more than \$12,000.00 of its invested capital, by way of the excessive freight charges withheld by appellant"; and then says, "the jury had a right to take these things into consideration, and to conclude that simple interest would be poor compensation for capital thus tied up and credit so injured." (Record, 216.) And this was the view of the trial court, and, accordingly, we see in its principal instruction to the jury, Instruction No. 1, the following language bearing upon this particular matter, to-wit:

"1. If you believe from the evidence in this case that the rates on cross-ties which were found to be unreasonable by the Interstate Commerce Commission by its order of April 8, 1912, were, to the extent said rates exceeded the rates then in force on lumber, wilfully and maliciously maintained by defendant with the intent to injure plaintiff's business of buying and selling ties, or with the intent to deter plaintiff from buying ties along the line of defendant's railroad, and that said rates which were charged plaintiff were, when so maintained, known by defendant to be unreasonable to said extent (or, etc.,

enumerating other possible things the jury might find), . . . and that defendant *by such act, or acts, if any were committed, did tie up a part of plaintiff's capital, or did impair or injure plaintiff's business or credit, or did injure the cross-ties of plaintiff or subject plaintiff to expense as defined in Instruction No. 4, or cause it to lose time from its business of buying or selling ties; and if you further believe from the evidence that by said acts, or any of them, if defendant committed such acts, or any of them, the plaintiff's business was damaged, then you will find for the plaintiff in such sum of money as you believe from the evidence will reasonably compensate the plaintiff for such injuries, if any were sustained by the plaintiff, not to exceed in all the sum of \$100,000.00.*" (Record, 59, 60.)

How it can be said, in the face of this language that "the instructions of the court prevent an allowance of any damage by reason of the act of charging excess freights," is incomprehensible to us. The instruction expressly allows it, instead of preventing it, and it was in fact the most emphasized feature of the whole case. And the rulings of the court on the motion to exclude testimony, and on defendant's motion for an instruction on this particular subject, make the matter all the clearer; for, as we have seen, defendant moved the court to exclude from the jury "all testimony to the effect that such rates thus charged were too high, or unreasonable, or unjust, for any reason, and all testimony as to any damage done to the Ohio Valley Tie Company by reason of such charges" (Record, 56, Motion No. 2); and the court overruled the motion to exclude this testimony. And again defendant moved the court to instruct the jury

"that it can not in this action allow any damages to plaintiff on account of defendant having charged to and collected from plaintiff unreasonable rates of freight on the carriage of interstate shipments of cross-ties (Record, 57); and the court overruled this motion, so to instruct the jury. And, as we have seen, the court gave exactly the opposite of this instruction, telling the jury they could consider the act of defendant in charging these unreasonable rates, if they believed from the evidence that it was maliciously done, and that thereby plaintiff's capital was tied up, or its credit impaired and that thereby it was damaged.

It therefore seems to us that for the Court of Appeals to say, as it did say, that "instructions of the court prevent an allowance of any damage by reason of the act of charging excess freights," is simply to say that white is not white or black is not black.

Both the lower court, however, as shown by its opinion on the demurrer to the petition (Record, 22, 23), and the Court of Appeals, as shown by its opinion (Record, 219, 221 and 224), held the view that the Interstate Commerce Commission had no power to award "general damages," that it could only award "special" or "statutory" damages, and that a shipper therefore had a right, when he had been charged excessive freight rates, to go before the Interstate Commerce Commission and there recover his "special" or "statutory" damages allowed by the Act to Regulate Commerce, and also go into a State Court and recover "other or additional" or "general" damages. We submit that this is an entirely erroneous view

to take of the effect of the Act to Regulate Commerce; that, on the contrary, the Interstate Commerce Commission has authority to award *whatever damage* a party suffers by reason of a violation of the Act to Regulate Commerce, such as the charging of excessive freight rates; and that while, in the first place, he has an election to go either before a *Federal Court* (not a State Court), or the Interstate Commerce Commission, with his claim for damages, and while, if he does go before the Commission and does get an award of damages, fixing the amount and ordering its payment by the carrier, he can then go into either a State or Federal Court to enforce the award *if the carrier refuses to comply with it*, yet if the carrier *does comply with it*, he can not go into *any court, either State or Federal*, with a claim for further damages based either in whole or in part on those same acts of which he complained before the Commission. But in no event, we submit, has a State Court jurisdiction of any action seeking damages for a violation of the Act to Regulate Commerce, except an action to enforce an order of the Commission for the payment of money which has not been complied with. And this is not such an action.

We have already quoted the applicable section of the Act to Regulate Commerce, to-wit, Sections 8, 9 and 16, from which we have seen that by Section 8 any common carrier which shall violate any provision of the Act to Regulate Commerce "shall be liable to the person or persons injured thereby for *the full amount* of damages sustained in consequence of any such violation of the pro-

visions of this act"; and by Section 9 that the person thus damaged may either make complaint before the Commission or before a Federal Court "for the recovery of the damages for which such common carrier may be liable under the provisions of this act"; but that he can not pursue both remedies; and finally that, by Section 16, if he does go before the Commission and does get an award of damages, and an order for payment, then the only liability to suit to which the carrier is subjected is that, *if it does not comply with the order of the Commission for the payment*, the shipper may bring suit to enforce the order either in a Federal or a State Court of competent jurisdiction; the right to go into a State Court in this latter event being given for the first time by the Amendment of June 1, 1910. And we submit that this is the construction which this court has twice put upon the Act to Regulate Commerce in very late decisions.

In *Penna. R. Co. v. International Coal Co.*, 230 U. S. 202, where the shipper was complaining that it had been damaged by a discrimination in rates in favor of another shipper, this court said:

"Having paid only the lawful rate plaintiff was not overcharged, though the favored shipper was illegally undercharged. For that violation of law, the carrier was subject to the payment of a fine to the government and, in addition, was liable for all damages it thereby occasioned the plaintiff or any other shipper. But under Section 8, it was only liable for damages. Making an illegal undercharge to one shipper did not license the carrier to make a similar undercharge to other shippers, and if having paid a rebate of 25 cents a ton to one customer, the car-

rier in order to escape this suit had made a similar undercharge or rebate to the plaintiff, it would have been criminally liable, even though it may have been done in order to equalize the two companies. For, under the statute, it was not liable to the plaintiff for the amount of the rebate paid on contract coal, but only for the damages such illegal payment caused the plaintiff. The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved they could not be recovered. Whatever they were they could be recovered, because Section 8 expressly declares that wherever the carrier did an act prohibited or failed to do any act required, it should be *'liable to the person injured thereby for the full amount of damages sustained in consequence of such violation, . . . together with reasonable attorney's fee.'* In view of this language it becomes necessary to inquire what the evidence shows was the injury inflicted or the damage sustained by the plaintiff in 1901 in consequence of paying rebates in 1901 on contract coal sold in 1899." (The above words italicized are the court's own italics—pages 202, 203.)

The case just cited was a suit brought in the Federal Court without any application having been made to the Interstate Commerce Commission; and involved, not an overcharge of unreasonable rates, but a discrimination in that to another shipper an unlawful charge was made, which was less than the published rates, a case, therefore, where the shipper could and did go into a Federal Court in the first instance, the violation of the statute appearing as matter of law, and did not go before the Commission at all. The case therefore did not

involve the question of what damages *the Commission* could allow. But it did involve the construction of Section 8 of the Interstate Commerce Act, as to what damages one could recover for a violation of any provision of the act, and it will be seen that the court there held that the damages might be the same as the rebate which had been allowed, or might be less, or might be many times greater but, "*whatever they were they could be recovered,*" because Section 8 expressly declares that the carrier violating the act shall "be liable to the person injured thereby *in the full amount* of damage sustained in consequence of such violation."

Subsequent to the decision of the case just mentioned, the court, on February 23, 1915, decided the case of *Meeker v. Lehigh Valley R. Co.* (~~113~~ U. S. 412), which 23 reaffirms the principles of *Penna R. Co. v. International Coal Co.*, and applies them *to a proceeding before the Interstate Commerce Commission*, where the complaint was that the shipper had been charged extortionate rates for the transportation of coal. The Commission in that case had made a finding that the rates were unreasonable, and had made an award of damages and an order for the payment of money, the amount being the difference between the rates which the shipper had paid and the rates which the Commission held were reasonable. And on that subject this court said:

"But it is said that the reports disclose that the Commission applied an erroneous and inadmissible measure of damages, and therefore that no effect can be given to the award. What the reports really

disclose is that the Commission, 'upon consideration of the evidence adduced upon the hearing upon the question of reparation' found (a) that by reason of the unjust discrimination resulting from giving the rebate to the Lehigh Valley Coal Company, Meeker & Company were 'damaged to the extent of the difference' between what they actually paid from November 1, 1900, to August 1, 1901, and what they would have paid had they been dealt with on the same basis as was the coal company; and (b) that by reason of being charged an excessive and unreasonable rate from August 1, 1901, to July 17, 1907, Meeker & Company were 'damaged to the extent of the difference' between what they actually paid and what they would have paid had they been given the rate which the Commission found would have been reasonable. In this we perceive nothing pointing to the application of an erroneous or inadmissible measure of damages. *The Commission was authorized and required by Section 8 of the Act to Regulate Commerce to award 'the full amount of damages sustained'* and that, of course, was to be determined from the evidence. If it showed that the damages correspond to the rebate in one instance and to the overcharge in the other, the claimant was entitled to an award upon that basis. The case of *Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U. S. 184, is cited as holding otherwise, but it does not do so: There a shipper, without proving that he sustained any damages, sought to recover from a carrier for giving a rebate to another shipper, and this court, referring to Section 8, said (p. 203): 'The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved, they could not be recovered. Whatever they were they could be recovered.' There is nothing in either report of the

Commission which is in conflict with what was said in that case. On the contrary, the plain import of the findings is that the amounts awarded represent the claimant's actual pecuniary loss; and, in view of the recital that the findings were based upon the evidence adduced, it must be presumed, there being no showing to the contrary, that they were justified by it." (P. 428.)

Thus it has been distinctly held by this court that by the provisions of the Act to Regulate Commerce a shipper is entitled to recover the full amount, whatever that may be, of damages sustained by him by reason of any violation of that act, which includes the charging of unreasonable rates; and that the Commission is authorized and required by that act to give this relief. So there can be no question of the authority, duty and power of the Commission to award to a shipper all the damage, whatever it may be, which he has sustained by reason of the violation by a carrier of the Act to Regulate Commerce. And when such a shipper has gone before the Commission and has obtained an award of damages on account of such violation, and has secured an order for the payment by the carrier of the damages thus awarded, the shipper must rest satisfied with this, if the carrier chooses to comply with the order; because the only condition upon which the statute then permits a shipper to go into court with a complaint on account of that same violation of the statute is in case the carrier does not comply with the order. And if the carrier should comply with the order and the shipper does choose to sue upon it, the order is made *prima facie* evidence of

the facts found by the Commission, one of which is that the amount of his damage is the amount stated in the order. But unless he alleges, whether he sues in a State Court, or in a Federal Court, that the carrier has not complied with the order, he states no cause of action. And, as said before, the only condition *under which a State Court is given jurisdiction* of an action for damages on account of a violation by a carrier of the Act to Regulate Commerce, which includes of course the charging of unreasonable interstate rates, is where the shipper has gone before the Commission with a claim for damages, and has received an award of damages, with an order for the payment of the same, and *the carrier has failed to comply therewith.*

It is true the *carrier* is not bound by the Commission's award of damages, and if the carrier chooses to dispute it and to contest the matter he may refuse to pay, and when the shipper sues upon the order the carrier may make an issue, and while the finding of the Commission is *prima facie* evidence, yet the carrier may rebut that evidence by testimony to the effect that the shipper was not thus damaged. But the *shipper* can not dispute the order if the carrier is willing to pay it. And there is nothing unjust about this; because it was the shipper's own voluntary action when he went before the Commission and claimed damages and got an award of damages; and having elected to claim damages before the Commission, and having received an award, it is only fair and just that he should be required to abide by it. On the other hand, inasmuch as the carrier had no election

in the matter and could not refuse to appear before the Commission, but was drawn before it by the act of the shipper, it is but fair and right that the carrier should be allowed to dispute and contest the finding of the Commission as to the damage, if it chooses to do so. And such it seems to us is the law, written so plainly that there can be no reasonable controversy over it.

Now applying these principles to the case at bar, when the Commission had held that the rates charged were unreasonable, the shipper then had an election under Section 9 as to where he would go with his claim for damages, not as to whether he would go before the Commission or into a *State* Court, but whether he would go before the Commission or into a *Federal* Court (*Mitchell Coal Co. v. Penn. R. R. Co.*, 230 U. S. 250). And then, having gone before the Commission with his claim for damages, and having gotten an award and an order for the payment of money, while a *State* Court under Section 16 would have had jurisdiction of a suit to enforce the order, if the carrier had not complied with it, yet, as the carrier did comply with it, no such jurisdiction arose.

Yet, as we have seen in the case at bar, where it appeared that the shipper had gone before the Commission and had claimed damages and had gotten an award and an order for payment, and the order had been complied with by the carrier and the money received by the shipper, it was held, over the objection of the carrier, that the court, a *State* Court, could give the shipper "other and additional" damages to those awarded by the Commission, damages which the court calls "general damages,"

the court saying that the only damage which the Commission was authorized to award is what the court calls "special" or "statutory" damages. And this we submit is directly in the face of the plain provisions of the Act to Regulate Commerce, and of the adjudications of this court.

The principle which we assert and its application are not avoided by saying that the charging of the rates complained of before the Commission constituted *only part* of the wrongs complained of by plaintiff in the case at bar. They certainly constituted a very important part. They lay at the foundation of the whole controversy. In its amended petition, setting up its proceeding before the Commission, and the Commission's action, plaintiff said:

"Plaintiff further states that *all the expenses* which it alleged in its original petition that it had incurred on account of the publication by defendant of the extortionate interstate rates on ties, and *all the damages* which it alleged in its petition that it had suffered as a result of the publication of said interstate rates, *were incurred and suffered as a result of the publication of said extortionate rates which were condemned by the Interstate Commerce Commission by its said order of April 8, 1912, in case No. 4411, Sub. No. 1, and plaintiff further states that the interstate rates on ties of the publication and collection of which it complains by its original petition are the rates condemned by said order of April 8, 1912.*" (Record, 26.)

In other words, says plaintiff, the rates of the publication and collection of which we complain herein, and on account of which we were compelled to incur the cost

and by reason of which we sustained the damage which we seek to recover in this action, were the identical rates, and none other, of which we complained before the Commission as violations of the Act to Regulate Commerce, and which were covered by its order of April 8, 1912, condemning those rates and fixing the damages for which the carrier was liable, which the Act says is "*the full amount of damages sustained* in consequence of any such violation of the provisions of this Act." And yet the court in this case held that, having gotten this award of the full amount of damages sustained by the violations of the Act complained of before the Commission, and having collected it, plaintiff could recover *other and additional damages* in that court, a State Court, on account of the identical violations complained of before the Commission; and plaintiff's case is not helped by the fact that in its petition it simply *adds to these alleged violations* in charging and collecting the rates complained of *other alleged wrongs*, such as unreasonably refusing to allow defendant's cars to go through to destinations off of defendant's lines, etc., which were in fact *merely incidental to the main question of the rates complained of*, and were steps taken to protect those rates and prevent their evasion while in force, as heretofore shown, and as will be further explained and commented upon hereafter. Nor can the matter be helped by injecting the further charge of *malice* into it all.

To conclude on this subject, the foundation of this whole suit for damages is the complaint that the Railroad Company charged and collected alleged *excessive rates on*

cross-ties, and that it refused to furnish any cars except its own for their transportation and refused to let its cars go off its lines, *the latter two causes of complaint being clearly incidental to the first*, because plaintiff's own president says it had no trouble about cars until this controversy over the rates arose (Record, 118), and that even afterwards defendant would turn the cars over to connecting lines *if plaintiff would pay the interstate rates* (Record, 109), yet the main wrong here complained of, viz., the charging of excessive rates, is not only a violation of the Act to Regulate Commerce (of which a State Court has no jurisdiction, except in a suit to enforce an award of the Interstate Commerce Commission), but is one of which plaintiff has actually made a complaint as such a violation before the Commission and obtained an award of damages, and an order on defendant for its payment, which order has been complied with. We therefore submit that the State Court in Kentucky had no jurisdiction of this action, certainly none so far as it is based on defendant's alleged wrong in charging excessive rates, which is the complaint lying at the foundation of the whole matter; and furthermore that, as plaintiff complained of that wrong before the Interstate Commerce Commission and got an award of damages therefor, which has been paid, no court, either State or Federal, can give any further or other damages based on those same alleged wrongs.

CURTIS'S ERROR IN REFUSING TO INSTRUCT THE JURY AS TO DEFENDANT'S DUTY TO PROTECT ITS FURNISHED CARS, AND NOT TO CORRUPT AN ART EXAMINER EMPLOYED.

At the conclusion of the evidence defendant moved the court to instruct the jury as follows:

"The court instructs the jury that under the Federal Act to Regulate Commerce, the defendant Railroad Company was required by said Act to charge and to collect from all shippers of interstate traffic the rates of freight fixed by its tariff which was at the time of shipment on file and in effect with the Interstate Commerce Commission at Washington, and it would have been a violation of law to have charged or collected from any such shipper a rate different from that which, at the time of the shipment, was fixed by such railroad company's tariff, then on file with the Interstate Commerce Commission and in effect, or to have committed at any arrangement whereby the payment of the rate fixed by such tariff should be avoided." (Record, 38.)

The fact that tariffs had been filed by defendant with the Interstate Commerce Commission, and that the questioned transaction in the 11th claim had been completely proved. Plaintiff's president said he knew this as to the period beginning with 1911, which covered the period of the controversy (Record, 112, 113), and Mr. Delaney, a witness for defendant, proved these facts as far back as 1902, and for a period covering all the transactions involved in this action (Record, 173, 174, 180).

The court, however, overruled the motion for this instruction, to which the defendant excepted (Record 39).

That the instruction requested states a proposition of law that is true, we suppose will hardly be disputed. It is the absolute legal duty of a railroad company to conform to its tariffs, and not to evade or connive at the evasion of these tariffs. For a violation of this legal duty it is criminally liable (*Penna. R. Co. v. International Coal Co.*, 239 U. S. 202). Whatever, therefore, may have been defendant's liability for publishing and charging rates that were more than reasonable, and which the Commission thereafter condemned, and ordered defendant to cease charging, it was undoubtedly its duty to charge them as long as they were in effect, and it could not be held liable in damages for using effective means to prevent the evasion of these rates. And this was the instruction which defendant asked the court to give the jury. And from the facts, which we have already stated, the court can readily understand the value to defendant of such an instruction in this case. It is unquestionably true, as we have already shown, that plaintiff was attempting from the middle of 1910, down to the fall of 1911, which is the period covered by this controversy, to evade the payment of interstate rates on its shipments of cross-ties by a device which would make the shipments appear to be intrastate shipments. And defendant, on the other hand, was trying to prevent this evasion and to force the payment of interstate rates on what were in truth and in fact interstate shipments. We have already seen that the plaintiff's president and chief witness, Mr. Bush, while stating that "the bulk of our ties at that time were interstate shipments," referring to a period during

1908 and 1909 (Record, 69), which manifestly continued to be true to the end, yet says that until some date in 1910, defendant did not actually charge its published interstate tariff rates on these shipments (Record, 73), but that in 1910, it began charging the interstate rates on these interstate shipments; therefore, he says, "when we received the second settlement showing all cars were now being assessed at the higher rate, we changed our method of doing business. We shipped those cars to the Ohio Valley Tie Company, Louisville, Ky., in care of the Big Four Railroad Company and paid the Louisville & Nashville Railroad Company freight up to Louisville at the lumber rate, and reconsigned the cars to the Nickel Plate" (Record, 75). And on cross-examination he admits that subsequent to this change "the business was practically the same character of business that it had been before" (Record, 138); and that it was interstate business is hardly subject to doubt (Texas, etc., R'y v. Sabine Tram. Co., 227 U. S. 111).

Defendant saw and knew what was being done and understood the purpose of it, to-wit, to evade the published rate on these shipments, and it sought to prevent the evasion by insisting that if the shipments were honestly mere shipments to Louisville, and only intrastate rates were to be paid, then the cars should be unloaded at Louisville, the cars being retained by the Louisville & Nashville Railroad Company; although it stated that if plaintiff would pay the interstate rates on the shipments, thus treating them as interstate shipments, it was willing that the cars should be turned over to con-

necting carriers and be allowed to go on through to destination, without being unloaded. Mr. Bush himself, plaintiff's president, states that this was the position of defendant (Record, 109). And for the same reason, and in order that it might be able to retain this means of forcing compliance with its published rates, defendant insisted that this particular company's ties be loaded in L. & N. R. Co.'s cars, which it could control.

But although these acts were taken in order to prevent the evasion of its tariffs by the Tie Company—for plaintiff's president admits that plaintiff had had no trouble with the Louisville & Nashville Railroad Co. *until this controversy arose* (Record, 118)—and although it was not only defendant's right, but its duty to do what it could to prevent this evasion, yet the steps which it took for this purpose, in refusing to allow its cars to go through to destinations beyond Kentucky loaded with these cross-ties, and in insisting that L. & N. cars should be used, in order that this control might be retained, were relied upon particularly as showing defendant's *malice* towards plaintiff. And, as we have seen, the court in its instruction, specifies those acts among the things complained of against defendant, while at the same time refusing to say to the jury that it was the legal duty of defendant to charge and collect from all shippers of interstate traffic its regular tariff rates, so long as they were in effect, and not to connive at any arrangement whereby they should be evaded.

It was vital to defendant that the jury should have been told this, and to understand it; because, as said

before, whatever may be the liability of defendant for publishing and charging what are claimed to be extortionate rates, it was not only its right, but its absolute legal duty, to protect those rates and prevent their evasion as long as they were in effect. And it had a right, therefore, to have the jury told that this was true, in order that it might argue to the jury that these acts upon which so much stress was laid, to-wit, the refusal to allow defendant's cars to go beyond its lines, unless the interstate rate should be paid, and its requirement that the ties of this company be loaded in L. & N. cars, in order that this control could be retained, were not evidences of malice on its part, but were lawful acts done for the lawful purpose of protecting its tariff and preventing their evasion so long as they were in effect. But the court refused to give the instruction and submitted the evidence as to those acts to the jury and specified the acts themselves in the instruction to the jury, without any explanation of what the law is on this subject of protecting the legally published tariff rates, even though they be too high.

Counsel argued that the defendant, if it had seen fit, could have reduced the tariff rates by application to the Commission. That may be true. And it is also true that plaintiff could have applied to the Commission for a general order condemning the classification of cross-ties as they were carried in the Louisville & Nashville Tariffs (see first twenty lines of Section 15 of the Act to Regulate Commerce as amended by Act of June 18, 1910). But it never did so, as its president states (Record, 135).

But that is neither here nor there; although defendant might have changed its classification or reduced its rates, and did not do so, and although plaintiff might have applied to the Interstate Commerce Commission for a general order condemning defendant's classification of cross-ties, and did not do so, yet so long as the tariffs were in effect, it was the duty of defendant to enforce them and not to suffer them to be evaded. And if wrong was done it was in making an improper classification and charging improper rates, and was not in adopting the means which it did adopt to enforce those rates and prevent the evasion of them, so long as they were in legal effect. Yet these latter acts were relied on as evidences of malice, and as being gross violations of law and of right, and are singled out in the court's instruction without any explanation, the court expressly refusing to give any explanation to the jury of what the law upon the matter is, which would have enabled the defendant to contend before the jury that these acts here referred to were lawful and not unlawful, that they were attempts to conform to the law, and not malicious violations of it.

We think the case of *Texas & Pacific R'y v. American Tie Co.*, 234 U. S. 138, has a direct bearing upon the feature of the case which we are now discussing. In that case the Tie Company sued the Railway Company for damages for refusing to ship cross-ties in interstate commerce. The principal defense of the Railway Company was that it had no published rate on cross-ties and therefore could not ship them, because it could not fix a rate.

The court held that this was a good defense, saying:

"There is no room for controversy that the law required a tariff and therefore if there was no tariff on cross-ties, the making and filing of such tariff conformably to the statute was essential" (146). One of the points of insistence by the plaintiff in the case was that the Railway Company's refusal was not in good faith, and that the absence of a schedule was a mere 'pretext and device.' The court enumerated this position of plaintiff, among others, in contending that the usual rule requiring an application to the Interstate Commerce Commission before calling upon the courts, should not apply to the existing case, and the court stated the defendant's position on this point, and the court's response as follows:

"(d) Because the Railway Company did not refuse to transport the ties in *good faith*, and insisted upon the absence of a scheduled rate simply as a pretext and device for preventing the shipment of the ties and their delivery in performance of the contract with the Union Pacific Railway, and with the ulterior and wrongful motive of keeping the ties on its line so as to be able to purchase them itself from the Tie Company. But without pausing to do more than direct attention to the fact that this proposition is necessarily disposed of by what we have said, that is, *by the lawfulness, in view of the state of the existing and filed tariff*, of the refusal until the Commission had acted, we think all the contentions under this last head are completely answered by the statement that the suit was based upon the unlawfulness of the action of the Railway Company in refusing to carry the ties in view of the filed tariffs, and therefore the contentions are not open for our consideration." (Page 148.)

The part of the quotation just made which bears specially on the present case is where the court calls attention to the fact that the Tie Company's charge of bad faith against the Railroad Company for refusing to take the ties, and its charge that this was a mere pretext or device in preventing shipment, to which it was moved by the wrongful motive of keeping the ties on its line, so that it might be able to purchase them, was all answered and disposed of "by the lawfulness, in view of the state of the existing and filed tariff, of the refusal until the Commission had acted." And that is exactly the principle upon which we are now insisting, namely, that whatever may be plaintiff's charge of bad faith and wrongful motive in publishing rates on cross-ties that were unreasonably high, yet so long as those rates were in force, it was the legal duty of the Railroad Company to maintain them, and not to permit them to be evaded; and therefore its actions taken to prevent the evasion that was being manifestly attempted were lawful, and can not themselves be made grounds for giving damages.

We therefore respectfully submit that defendant was clearly entitled to have the offered instruction now under consideration given to the jury, in order that the jury might intelligently understand the situation and be able at least to appreciate defendant's claim as to the meaning and purpose of its acts.

DAMAGES FOR REFUSAL OF DEFENDANT TO PERMIT ITS CARS TO
GO OUT OF ITS POSSESSION.

As we have seen, the point was clearly and distinctly made that defendant had a right to retain possession of its own cars, and that to take them from its possession and transfer them to the possession of another, against its consent, or to give damages against it because it refused to allow its cars to go out of its possession, was a deprivation of defendant's property, without due process of law, contrary to the Fourteenth Amendment to the Federal Constitution. And we submit that the truth of this proposition is settled by the case of Central Stock Yards Company v. Louisville & Nashville Railroad Company, 212 U. S. 132. In that case a suit was brought in a State Court in Kentucky by the Central Stock Yards Company against the Louisville & Nashville Railroad Company, seeking to compel the Louisville & Nashville Railroad Company to deliver up its cars loaded with live stock to the Southern Railway Company, to be transported by the Southern Railway Company to the Central Stock Yards Company, the yards of which constituted the live stock depot of the Southern Railway. A judgment was entered for the plaintiff, granting the prayer of its bill. We quote this court's statement as to part of the judgment, as follows, to-wit:

"The Railroad Company was ordered (1) to receive at its stations in Kentucky, and 'to bill, transport, transfer, switch and deliver in *the customary way,*' at some point of physical connection with the tracks of the Southern Railway, and particularly at

one described, all live stock or other freight consigned to the Central Stock Yards or to persons doing business there. (2) It was ordered further, to transfer, switch and deliver to the Southern Railway at the said point of connection, 'any and all live stock or other freight coming over its lines in Kentucky consigned' to the Central Stock Yards or persons doing business there." (Page 141.)

The Court of Appeals of Kentucky affirmed the judgment and a writ of error was prosecuted from this court. Among other things it was insisted that the judgment ordering defendant to send its cars out of its possession, even though the Court of Appeals had held that this was required by Section 213 of the Constitution of Kentucky, was a taking of defendant's property without due process of law, contrary to the Fourteenth Amendment to the Constitution, and on that subject this court said:

"It was argued, however, that the *requirement that the plaintiff in error should deliver its own cars to another road was void under the Fourteenth Amendment as an unlawful taking of its property.* In view of the well-known and necessary practice of connecting roads, we are far from saying that a valid law could not be passed to prevent the cost and loss of time entailed by needless transshipment or breaking bulk, in case of an unreasonable refusal by a carrier to interchange cars with another for through traffic. We do not pass upon the question. It is enough to observe that such a law perhaps ought to be so limited as to respect the paramount needs of the carrier concerned, and at least could be sustained only with full and adequate regulations for his protection from the loss or undue detention of cars, and for securing due compensation for their use. The Constitution of Kentucky is simply a universal un-

discriminating requirement, with no adequate provisions such as we have described. The want can not be cured by inserting them in judgments under it. The law itself must save the parties' rights, and not leave them to the discretion of the courts as such. (Citing authorities.) It follows that the requirement of the State Constitution can not stand alone under the Fourteenth Amendment, and that the judgment in this respect also, being based upon it, must fall." (Pages 143, 144.)

The only difference between that case and this case is that in that case a court of equity ordered the Railroad Company to deliver its cars out of its possession and into the possession and control of another, "in the customary way," for the benefit of the Central Stock Yards Company, and justified this judgment by Section 213 of the Constitution of Kentucky, which it construed as requiring an interchange of cars between Railroad Companies having physical connection; whereas, in the case at bar, a court of law has given judgment for damages against that same Railroad Company, because it refused to pursue that same character of procedure for the benefit of the Ohio Valley Tie Company.

And, as this court held in the Central Stock Yards case, that the effect of the court's action was to deprive defendant of its property without due process of law in the absence of a valid law providing for the interchange of cars under proper restrictions and regulations for the protection of the owner of the cars against loss and undue detention of cars and securing due compensation for their use; and as no such law has been passed or adopted since that decision covering any such subject, we can not see

why it is not absolutely conclusive upon this question in the case at bar.

It was contended in the State Court that such interchange of cars was "customary," and it should doubtless be mentioned that the instruction of the trial court to the jury submitted to them the question of damages only in the event they should find that defendant was *accustomed*, under substantially similar circumstances and conditions, to permit its cars to go forward upon other lines without being unloaded. But it must be observed that the judgment in the Central Stock Yards case likewise ordered the cars to be delivered to the connecting carrier only "in the customary way." (212 U. S. 141.) And there was proof in that case, as well as in this case, about the custom of railroads to interchange cars, there being also proof in that case, as in this case, that while railroad companies do very frequently exchange cars, yet they reserve a right not to exchange them, and frequently do refuse to exchange them. And in the case at bar it was shown, as we have already seen, that the Ohio Valley Tie Company was attempting to evade the published tariff rates of the Louisville & Nashville Railroad Company by its manner of shipping its freight, and therefore, to make what were really interstate shipments under the pretense of intrastate shipments for that purpose, although at the same time trying to use defendant's cars for the through carriage of the Tie Company's freight on to other lines beyond Kentucky. And there is not a scintilla of evidence from any witness that any other shipper had tried to do that thing, or that there was

any occasion for the Louisville & Nashville Railroad Company to refuse an interchange of cars in order to block an attempt by any other shipper to evade its rates.

Mr. Milton H. Smith, President of the Louisville & Nashville Railroad Company, was called as a witness by the plaintiff, the Tie Company, and was asked about the custom of a railroad company to allow its cars to go upon other lines, and he explained at length what the practice was, explaining that it allows this in many cases, but that "no company allows its cars to leave its line except with its consent, and when in the opinion of the management its interest will be promoted thereby" and that it frequently would be most disastrous to a railroad company if it could be required to allow its cars to go off its lines (Record, 159); and being asked the specific question if he would allow a car, even a car belonging to another company, to be loaded on the line of the Louisville & Nashville Railroad Company and transferred to another company, when he believed that the purpose was to make an interstate shipment under the guise of a State shipment, so as to pay only the State rate when the interstate rate was due, he of course said he would not (Record, 160, 162).

We submit, therefore, that the ruling of the State Court that defendant could be mulcted in damages for refusing to send its cars off its line, the protection of the Federal Constitution being specially set up and claimed on this point, was manifestly erroneous, as settled by this court's decision in *Louisville & Nashville Railroad Company v. Central Stock Yards Co.*, 212 U. S., *supra*.

CONCLUSION.

We therefore submit, in conclusion (1) that the court has jurisdiction of the writ of error herein; (2) that the questions raised on the writ are not frivolous, and that the case is entitled to that time for argument that is ordinarily allowed by the rules of the court, and (3) that the motions to dismiss, affirm or transfer to the summary docket should therefore be overruled.

HELM BRUCE,

Counsel for Plaintiff in Error.

HENRY L. STONE,

Of Counsel.

April 12, 1915.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 356.

LOUISVILLE & NASHVILLE RAILROAD COM-
PANY, - - - - - *Plaintiff in Error,*
versus

OHIO VALLEY TIE COMPANY, - - *Defendant in Error.*

REPLY BRIEF FOR PLAINTIFF IN ERROR.

We have just been handed a copy of the brief for defendant in error, and desire to make this reply thereto.

I.

We had not anticipated that the objection to the jurisdiction of this court would again be seriously urged, but counsel devote a very large part, in fact the major part, of their brief to a microscopical examination of the record in the endeavor to show that the federal questions herein involved were not properly raised in the trial court. Even if that were true, though it is not, the principal question which we make is shown by the opinion of the Court of Appeals of Kentucky to have been made

in that court, which, in view of the character of the question, would be sufficient to give this court jurisdiction of it. The Court of Appeals in its opinion says:

“The appellant next offers as a bar to the prosecution of this action, *the fact that appellee elected to go to the Interstate Commerce Commission with complaint of unreasonable rates, and asked damages on that account. It argues that to permit appellee to recover other or additional damages growing out of or incidental to the acts complained of, will be a direct violation of the Interstate Commerce Act. To support its contention it relies upon Section 9 of the Act.*” (Record, 218.)

This statement alone shows that the defendant specifically made the point in the Court of Appeals that, that as plaintiff had gone before the Interstate Commerce Commission with its complaint of unreasonable rates, and had asked damages therefor, it could not maintain this action in the court in which it was brought to recover “other or additional damages growing out of or incidental to the acts complained of.” This was an objection to the judgment which could be made on the face of the pleadings, independent of anything that occurred at the trial—the pleadings did not support the judgment—and such an objection might have been made for the first time in the Court of Appeals, though in fact it had been made in the trial court.

It is true the Court of Appeals meets this question by saying:

“We do not believe this position is tenable for three reasons: (1) This objection should come by

way of a plea in abatement, and, (2) The Interstate Commerce Commission as to damages is not a court, and its finding in that regard is evidently (evidential) merely—neither binding nor conclusive; and (3) The instructions of the court prevent an allowance of anything for excess freight or any damage by reason of the act of charging excess freights.” (Record, 219.)

But of course it is manifest that it was not necessary, nor would it have been proper, to raise the question referred to by a plea in abatement. The plaintiff’s petition showed on its face, even on the face of the original petition, that it had carried this complaint to the Interstate Commerce Commission, and that it was there pending (Record, 3 and 4). And its amended petition showed that the Commission had decided the matter and awarded damages (Record, 23 and 24). And this of itself showed that the State Court had no jurisdiction to award “other or additional damages growing out of or incidental to the acts complained of.” It did not even take the actual decision of the matter by the Commission to show this fact. In *Pennsylvania Railroad Co. v. Clark Bros.*, 238 U. S. 456, this court, in speaking of an action which had been brought in a State Court to recover treble damages under a State statute when there was a complaint pending before the Interstate Commerce Commission, said:

“The fact that the Commission had not made its award of damages at the time the action was brought is immaterial. The proceeding before the Commission was pending, and the plaintiff’s *right and remedy* were fixed by the Federal Act.” (Page 473.)

And manifestly, when it appeared on the very face of plaintiff's own petition, both original and amended, that plaintiff had carried its complaint before the Interstate Commerce Commission, and that therefore the State Court had no jurisdiction to give damages on account of the facts complained of before the Commission, the Court of Appeals could not cut defendant off from insisting upon this proposition in this court by saying that the question ought to have been raised by a "plea in abatement."

In *National Mutual B. & L. Assn. v. Brahan*, 193 U. S. 635, it was claimed that the federal question was not properly raised, and that the Supreme Court of Mississippi had so decided; and in fact the Supreme Court of Mississippi did so decide, saying that the proceeding in the lower court was "an ingenious but unsuccessful effort to inject the federal question into the record." But this court held that it was not thereby precluded from considering the question. In an opinion by Mr. Justice McKenna, the court said:

"It is objected that the federal questions presented can not be considered 'because they were not raised in time and in the proper way,' and that the Supreme Court did nothing more than decline to pass on the questions because they had not been raised in the trial court, *as required by the State practice*.

"The Supreme Court considered that plaintiff in error, by the motions to amend the notice, attempted to 'inject' a federal question into the record, and that the instruction asked by the plaintiff in error had the same purpose. * * *

"Upon the ruling of the court upon the amendments to the notice we are not called upon to express an opinion, but, we think, it is very clear that plaintiff in error was entitled to claim rights under the Constitution of the United States based upon the case as presented. And if the rights asserted actually existed, plaintiff in error was entitled to an instruction directing a verdict in its favor. The claim was, therefore, made in time. (Citing authorities.) It was also in sufficient form." (Page 646.)

As said by this court in *Carter v. Texas*, 177 U. S. 442, 447, reaffirmed in *Erie Railroad Co. v. Purdy*, 185 U. S. 148, 152:

"The question whether a right or privilege, claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a State Court, *is itself a federal question*, in the decision of which this court, on writ of error, *is not concluded by the view taken by the highest court of the State.*"

Other cases along the same line were cited and quoted in our brief on the motion to dismiss or affirm, but it does not seem necessary to cite them again.

As a matter of fact, furthermore, the question of the court's jurisdiction to give a judgment for damages based in part upon the charging of alleged extortionate interstate rates was made again and again in the trial court in forms which this court has held to be sufficient, as is shown in our original brief and will hereinafter be mentioned.

II.

As to the assignments of error filed in the Court of Appeals in bringing the case up to this court, the eighth assignment alone, even if there had been no other more specific assignments, would have been sufficient to present the federal question which we have mainly argued, that assignment being as follows:

“The court erred in holding that the Jefferson Circuit Court of Kentucky had jurisdiction of this action in so far as plaintiff herein seeks to recover damages from defendant on account of violation of the Federal Act to Regulate Commerce.” (Record, 253.)

In addition, however, to that general assignment of error, defendant did make other more specific assignments, such as the first, second and third, in which the facts were briefly summarized, the complaint in each assignment being that the court erred in holding that under such facts the plaintiff could recover other or additional damages on account of the matters complained of before the Interstate Commerce Commission (Record, 252, 253).

III.

It is not necessary to repeat here, with any elaboration, the statements we have made in our original brief, showing how the federal questions were raised in the Circuit Court of the State.

By the second paragraph of the demurrer to the original petition defendant objected that as to “so much of the

petition herein as complains of defendant's alleged wrong in publishing in its tariffs for the transportation of interstate freight, rates on cross-ties which are alleged to be extortionate and unreasonable * * * this court has no jurisdiction to give relief for the aforesaid alleged wrong or wrongs," referring to the Act to Regulate Commerce in support of the demurrer. (Record, 20.) And while it is true the court sustained that demurrer, yet it did so in an opinion showing that its ruling was only temporary, to-wit, until the Interstate Commerce Commission should have actually passed upon the *reasonableness of the rates*, the court saying that "*the Commission can not award general damage.*" (Record, 23.) Thus the trial court's attention was called at the outset to defendant's objection to its jurisdiction. But as soon as the Commission passed on the reasonableness of the rates involved the court took jurisdiction, and undertook to give additional, or what the court calls "general," damages on account of the same wrongs that had been complained of before the Commission.

Then on the trial defendant moved the court to exclude all the testimony as to the charging of unreasonable rates on interstate shipments, and expressly based this motion on the Act to Regulate Commerce, claiming that "this court has *no jurisdiction*" to consider or determine the *amount of damage* to a shipper on this account (Record, 55, 56). It is difficult to see how the point could more clearly have been brought to the court's attention than by this motion, this court having said, "It is sufficient if it appears from the record that such right

was specially set up and claimed in the State Court *in such manner as to bring it to the attention of the State Court.*" (Chicago, Burlington & Quincy R. R. v. Chicago, 166 U. S. 226, 231.)

Counsel suggest that the State Court may have thought that it was not proper practice to make a motion to exclude testimony when the original introduction of it had not been objected to. But it is perfectly manifest that the court did not take any such view of the matter, because it did exclude, and instruct the jury not to consider, the testimony relating to the charge and collection of the alleged excessive rates on 89 cars which had been the subject of the action in the other case in the State Court (Record, 61), although this testimony also had not been objected to when offered. Defendant had moved the court to exclude both (1) the testimony relating to the alleged excessive charges on the 91 cars which were admitted to be interstate shipments, and (2) also the testimony relating to the alleged charges of excessive rates on the 89 cars which were claimed to be intrastate shipments, and which charges had been involved in another case in the State Court. And while the court at first overruled both motions (Record, 56) yet it subsequently took back its ruling as to the last testimony (to-wit, the testimony as to the excessive rates involved in the other case in the State Court), and excluded it (Record, 61); thus showing of course that the court was not influenced by any thought that a motion to exclude testimony could not properly be made because the testimony had not originally been objected to. And we are sure we can safely say, without fear of contradiction, that no case can be

found in Kentucky where any such rule was ever asserted.

Furthermore, this was an objection to the jurisdiction of the court over the subject-matter, and whether it came by way of a demurrer, or by a motion to exclude testimony, or by a motion for an instruction, or in whatever way it came, it was a statement, *distinctly brought to the court's attention and entered of record*, that the defendant objected to the jurisdiction of the court to give damages based on alleged excessive charges of interstate rates, and that the objection was rested upon the Act to Regulate Commerce.

Counsel again make the criticism that the overruling of the motion to exclude this testimony was not made ground of the motion for a new trial. But it was so made within the rulings of the Court of Appeals of Kentucky on the subject of motions for new trial. Of course the court knows that in the Federal courts a motion for a new trial after a jury trial is not necessary at all, and the action of the lower court in granting or overruling such a motion will not be reviewed. And while this is not true in the State practice in Kentucky, and it is true that a motion for a new trial must be made and that an error of the court not involved in any of the grounds for a new trial will not be considered, yet the Court of Appeals has always held that the grounds of the motion for a new trial can be very general, and that it is not necessary to specify particular errors either in rulings upon testimony, or in instructions given or refused. Thus in *Meaux v. Meaux*, 81 Ky. 475, 479, it held that it was sufficient to assign as grounds for new trial as follows:

"1. Because the court permitted the introduction of incompetent and illegal testimony that was excluded to at the time.

"2. Because the court erred in rejecting important testimony which was offered in his behalf.

"3. Because the court erred in giving the instructions for the defendant.

"4. The court erred in refusing instructions offered by the plaintiff."

And in giving its reasons for this ruling, the court said:

"The court, during the progress of the trial, must be presumed to know the exceptions reserved by counsel in this regard (for without the exceptions the error will not avail), and, when the motion is made, he is informed of the errors by reason of the exceptions, and as in regard to instructions, an error in giving instructions for one party, or refusing to give for the other, is sufficient, because exceptions are taken at the time they are given or rejected. The trial court is informed of the errors by the exception taken during the progress of the trial, and his attention again called to them by the motion and grounds for a new trial." (Page 673.)

Now, manifestly, in the case at bar when a motion was made in writing to exclude certain testimony, and reasons given in writing for the exclusion, and the court overruled this motion, and exceptions were reserved to the court's action, much more must it be presumed that the court is informed of this matter than if various dispositions were orally made and passed on from time to time during the course of the trial. And in the case at bar, when in the motion for new trial defendant assigned as a

ground that "the court acted in admitting incompetent and irrelevant testimony, objected to by the defendant at the time" (Beauch, 11), it is a hypertechnical criticism, in view of the rule established by the Court of Appeals of Kentucky, to say that this did not include an objection made by means of a motion to exclude. The motion to exclude was an objection to the testimony, the ground of objection being stated in the motion, and the action of the court in refusing to exclude the testimony and leaving it to be considered by the jury when they should take the case, was an admission of the testimony. It frequently happens in the case of a jury trial that both error is offered, the objection to which may not come to court at the time, and it is common practice to move to exclude testimony and leave the court rule upon the case, and on one side one it would be a startling revelation to members of the bar in Kentucky, practicing under the rule laid down by the Court of Appeals in *Beauch v. Beauch*, more than thirty years ago, to learn that the stereotyped form of ground for new trial (which that for most "acted in admitting incompetent testimony" or "acted in rejecting competent testimony") does not include a ruling by the court on a motion to exclude both error; it being understood that these grounds include all obvious rulings of the court on questions of evidence.

As said by the court in *Louisville & Nashville Railroad Company v. M'Intosh*, 15 47, 62 402.

"The object of the motion and grounds for new trial is to call the attention of the trial court to any error that may have been committed at the trial, and

to allow an opportunity, without the expense and delay of an appeal, of correcting it. This being so, all that is necessary in any case is to use such plain and intelligible language in the grounds for new trial as indicates, points out, or shows to the court, with reasonable and ordinary certainty, the particular errors which are complained of, so as to enable the court, by the exercise of proper attention, to understand what errors are meant, and to reconsider the facts or law out of which they are alleged to have grown. Unreasonable particularity or *technical accuracy* in the description of the errors, is not required or practicable." (Pages 406, 407.)

So in the case at bar, the court certainly knew that defendant meant in its motion for a new trial to object to the court's *rulings upon evidence* in allowing to be considered by the jury that which defendant thought was improper and had moved to exclude. And this is all the practice in Kentucky requires.

In this connection counsel quote in their brief (page 27) certain language of the Court of Appeals in the present case concerning a failure to object to testimony, as if the court were there holding that a motion to exclude was not proper when there had been no original objection; but a simple reading of that part of the opinion from which this extract is made will show that the court had absolutely no such meaning. The court was then speaking of testimony which the lower court *did exclude* on motion after it had been admitted without objection, viz., the testimony concerning the alleged excessive charges on the 89 cars involved in the other State Court case; and the court does not intimate that there was any-

thing improper in the practice, but it was simply responding to what it says was an argument of counsel bearing on the excessiveness of the verdict, viz., that while the court did ultimately exclude this testimony and tell the jury not to consider it, yet they had heard it and their verdict was doubtless influenced by it. And in responding to this argument the court says that, however that may be, yet, as the testimony was not objected to when offered, its admission at that time was not reversible error (referring to testimony which the court ultimately excluded).

But defendant did not stop with the mere motion to exclude the testimony as to alleged unreasonable rates, it also *moved the court to instruct the jury* that "It can not in this action allow any damages to plaintiff on account of defendant having charged to and collected from plaintiff unreasonable rates of freight for the carriage of interstate shipments of cross-ties." And at the time of offering this instruction the record shows that defendant said to the court that "In offering this instruction defendant relies upon the Federal Act to Regulate Commerce, approved February 4, 1887, and the various amendments thereto" (Record, 57). And while counsel for plaintiff criticise the language used by counsel for defendant in elaborating the objection or, in other words, giving the reasons why the objection was well taken, yet the ultimate fact that the defendant did ask the court to instruct the jury that it could not allow any damages for these excessive charges, and that defendant announced that it based the objection on the Federal Act to Regulate Commerce, is indisputable. And, as said by this

court in *Dewey v. Des Moines*, 173 U. S. 193, referred to in our original brief,

“Parties are not confined here to the *same arguments* which were advanced in the courts below upon a federal question there discussed.” (Page 197.)

As to counsel's suggestion that this offered instruction seems to have been “intended merely to supplement or explain the instructions given,” of course this can not possibly be true. The instruction was offered before the court's instructions were given, as the record shows; for it shows that this and certain other instructions were offered by defendant, that the court refused to give any of them, that defendant excepted to this refusal and, says the record, “*thereupon* the court gave to the jury the following instructions” (Record, 58, 59). What happened is that defendant offered this instruction, and the court refused it, and *gave exactly the opposite of it*.

Thus it is plain that all through the case in the trial court defendant was bringing to the court's attention its objection that the court had no jurisdiction to give damages on account of the charge of excessive rates on interstate shipments; and it is not possible that the court could have failed to understand that defendant did thus object.

But, as said before, aside from all these objections in the trial court, and even if none of them had been made, yet the Court of Appeals, by its opinion, shows that, *in that court*, defendant made the same objection relying upon the Act to Regulate Commerce, and especially sec-

tion 9 of that Act, in support of the objection (Record, 218).

IV.

If we understand the argument of counsel, of which we are by no means sure, they seem to draw a distinction between "charging" and "collecting" and "publishing" and "maintaining" rates, and to contend that plaintiff never claimed damages *in this action* for the *charging or collecting* of excessive rates on interstate shipments, but only for *maintaining* them in its tariffs, and thereby causing plaintiff an indirect damage by deterring it from trying to do business, as distinguished from that more direct damage resulting from the actual *charging and collecting* of excessive rates; and they seem to contend further that the trial court drew this distinction in its instructions and did not allow any damage for excessive rates charged and collected, but only allowed damage resulting from maintaining, in the sense of publishing, excessive rates, excluding any damage resulting from the actual charging and collecting of these rates. And it is in this way that counsel attempt to show, if we understand them, that they are not seeking to recover, and have not recovered, in the present action, any damages growing out of the facts of which they complained before the Interstate Commerce Commission.

This record completely meets and refutes this contention. It conclusively shows that plaintiff did, from the beginning, complain of the fact that defendant had *actually charged and collected* excessive rates on inter-

state shipments, alleging this among the wrongful acts for which it sought damages, and that the court allowed damages on account of these acts and, in its opinion on the motion for a new trial, expressly referred to the *collection* of these alleged unlawful charges, and the damage resulting therefrom, as justification for the amount of the verdict.

Simply read the petition of plaintiff. We find in it, among others, the following allegations of facts alleged by way of showing the wrongs committed by defendant and upon which plaintiff based its claim for \$100,000 damages, to-wit:

"And plaintiff further states that under said interstate tariffs, which apply to cross-ties the fifth class rate, *defendant has collected many thousands of dollars, upon interstate shipments of cross-ties in excess of what the freight charges on said shipments would have been if they had been based on the lumber rate, and defendant still holds the full amount of said excessive charges so collected.*" (Record, 3.)

Again, we find this allegation in the petition:

"Plaintiff states that by reason of defendant's said malicious and unconscionable action in publishing rates on cross-ties which it knew to be extortionate and which it did not intend to defend in the event that they should be attacked, and in refusing to change said classification, plaintiff has been compelled to employ attorneys to file complaints before the Interstate Commerce Commission *to obtain reparation on account of said extortionate charges*, and plaintiff will be compelled to pay reasonable fees to said attorneys in the prosecution of said complaints, *which are now pending.*" (Record, 9.)

From the allegation just quoted we see that plaintiff was alleging, as one element of its damage, the fact that it had been compelled to employ attorneys to appear before the Commission to complain about these charges that had already been made and collected, and to obtain reparation; these attorney's fees being simply *part* of the damage claimed to have resulted from that wrong, and which the court afterwards allowed by its instructions and the jury gave by its verdict.

Then again, we find this allegation in the petition:

"Plaintiff further states that while defendant knew that plaintiff would be able to finally *recover the said freight charges collected by defendant* in excess of reasonable charges the defendant knew that said excessive charges could and would be withheld by defendant for a long period of time, and that plaintiff *would be deprived of the use in its business of that much of its capital*, and that its business would thus be hampered and crippled. And plaintiff further states that by reason of said malicious acts of defendant a *substantial part of plaintiff's capital is now wrongfully held by defendant*, and plaintiff's business, as defendant maliciously intended that it should be, has been seriously crippled by defendant's said malicious acts, and plaintiff by reason of said acts *has been compelled to borrow large sums of money* which but for said acts it would not have been compelled to borrow, and to pay large sums as interest on said borrowed capital, which but for said acts it would not have been compelled to pay, and plaintiff by reason of defendant's said malicious acts *has been deprived of the use not only of the freight charges, paid by plaintiff, in excess of what said charges would have been if based upon the lumber rate, but has also been deprived of the use of said money paid as interest.* Plaintiff further states that

by reason of defendant's said malicious acts and the said *tying up of plaintiff's capital, plaintiff's credit has been greatly impaired,*" etc. (Pages 10, 11.)

Thus we see that plaintiff, in its petition, specifically complained, not merely of the "maintaining," in the sense of publishing in its tariffs, these excessive interstate rates, but complained of the actual *charging and collecting* of them, and of the fact that by reason thereof it had been compelled to employ attorneys to appear before the Interstate Commerce Commission and seek reparation, and that its credit had been impaired, and that by reason of these things its business had been damaged.

Then, in the amended petition wherein plaintiff pleaded the finding of the Interstate Commerce Commission, it makes this statement, after referring to this order of the Commission:

"And plaintiff further states that the interstate rates on ties of the publication *and collection* of which it complains by its original petition, are the rates condemned by said order of April 8, 1912." (Record, 26.)

It is, therefore, indisputably clear that plaintiff, in its petition, did not seek damages based only upon the fact that defendant carried in its tariffs these excessive rates, but that it actually *charged* them to plaintiff and *collected* them from it.

Then on the trial of the case before the jury, counsel brought out from their principal witness, plaintiff's President, Mr. Bush, the fact of these excessive charges and collections, he saying,

"They had all told, in those overcharge claims, \$20,000 at one time." (Record, 117.)

And the court's instruction to the jury, while it refers to maintaining rates, refers also to such rates as "*were charged plaintiff*" saying to the jury,

"If you believe from the evidence in this case that the rates on cross-ties which were found to be unreasonable by the Interstate Commerce Commission by its order of April 8, 1912, were, to the extent said rates exceeded the rates then in force on lumber, wilfully and maliciously maintained by defendant with the intent to injure plaintiff's business of buying and selling ties, or with the intent to deter plaintiff from buying ties along the line of defendant's railroad, and that said rates *which were charged plaintiff* were, when so maintained, known by defendant to be unreasonable to said extent * * * and that defendant by such act or acts, if any were committed, did *tie up a part of plaintiff's capital*, or did impair and injure plaintiff's business or credit * * * then you will find for the plaintiff," etc. (Record, 59.)

Thus it will be seen that the court refers to the "rates which were charged plaintiff" and to the tying up of plaintiff's capital, and there is absolutely nothing in the instruction which tells the jury to exclude that damage which was claimed to have been done by charging and collecting these excessive rates. It will be observed that there is no *time limit* in the instruction. It covers all the time during which these rates were maintained, from the time defendant began charging and collecting them in the spring of 1910, more than a year before plaintiff's application to the Commission, down as long as they were maintained.

It is true the court said to the jury "you must not include in your verdict any sum or sums representing the difference or differences between the rate for hauling lumber and the fifth class rate paid by plaintiff on shipments of cross-ties" (Instruction No. 5). But it did not tell the jury that they could not include those other damages of which plaintiff complained, resulting from these excessive charges, such as attorney's fees that had to be paid to recover them, and such as the impairment of credit resulting from being kept out of its money, and general damage to its business by not having this money which it could turn over two or three times a year, as plaintiff's president testified it was accustomed to do, and by which it would make more than legal interest.

And that the court thus understood its own instructions is perfectly manifest from its opinion overruling the motion for a new trial. In that opinion, in giving the court's reasons for holding that the verdict could not be set aside as excessive, the court in referring to these excessive rates, says "*These charges were enforced by the railroad company against the plaintiff, and the money was held until, from time to time after the hearing by the Interstate Commerce Commission, restitution was adjudged and so plaintiff was kept out of large sums of money by the defendant*" (Record, 50); thus showing that the court understood that the jury were allowed to find damages based, in part, on the fact that plaintiff had been *compelled to pay defendant these excessive charges*; this being one of the reasons assigned by the court for upholding the jury's verdict.

And the Court of Appeals itself refers to the same consideration in treating of the matter of the amount of the jury's verdict. Thus the Court of Appeals says:

"As to the complaint that the verdict is excessive, it is directed at the \$50,000 for injury to plaintiff's credit, and \$5,000 damages to cross-ties, and we may say again, that before we are authorized to reverse for that reason the damages must be so excessive as to strike one at first blush as being the result of passion and prejudice. * * * *In considering the extent of damage it will be well to recall that these wrongful practices of appellant began in the year 1910, and culminated during appellee's fiscal year beginning September 1, 1911. * * * For at least two years appellee was deprived of profit from this borrowed capital by the injury to its credit, and was also deprived of more than \$12,000 of its invested capital, by way of the excessive freight charges withheld by appellant. * * * The jury had a right to take these things into consideration, and to conclude that simple interest would be poor compensation for capital thus tied up and credit so injured.*" (Record, 215, 216.)

It is thus seen that the Court of Appeals in its consideration of the facts said to justify the jury's verdict, expressly takes into consideration those alleged wrongful practices of defendant which the court says *began in the year 1910*, which was the collection from plaintiff of the excessive interstate charges, and comments particularly upon the fact that plaintiff had been deprived of a large amount of its invested capital by reason of these excessive charges and collections.

We submit, therefore, that it is idle for counsel to contend that plaintiff did not ask and that the court did

not allow damages in this case resulting from the charging and collecting of excessive interstate rates by defendant, being in part the very excess rates complained of before the Interstate Commerce Commission.

So much for what plaintiff claimed and was allowed in the case at bar.

Now, on the other hand, when we turn to the proceeding before the Interstate Commerce Commission, we see from plaintiff's own statement in its petition that it there complained both of the "publication" and the "collection" of these excessive rates and prayed that both be enjoined, and says that "it filed its complaint before the Interstate Commerce Commission *complaining of the rates published and collected* on said shipments of ties, and praying that defendant be required to cease and desist from *charging or collecting* for the transportation of cross-ties in carloads," etc. (Record, 24.)

The whole subject, therefore, of the *publication* and the *collection* and the *maintenance* of these alleged excessive interstate rates, was before the Commission and complained of by plaintiff; and whatever damages plaintiff sustained thereby the Commission could allow, or, to use the language of this court in speaking of such damages, "whatever they were, they could be recovered."

It is thus perfectly plain that plaintiff's recovery in the case at bar was based, certainly in part, and in a very large part, upon the very alleged wrongs complained of before the Commission. And the Court of Appeals, in the concluding paragraph of its opinion, recognizes this fact, saying:

"In our opinion, the fact that the Interstate Commerce Commission may have recommended the payment of *special damage* which flows from violation of federal law is no reason why the State Court may not take cognizance of a suit *based in part upon another result of that act* which, when connected with many other acts, of a different nature, will show a wilful and malicious purpose, and give rise to this common-law cause of action." (Record, 222.)

V.

In response to the statement that the refusal to accept the cars of the Pennsylvania Railroad Company for loading plaintiff's ties, and the requirements that these ties be loaded in defendant's own cars and unloaded at Louisville, were for the purpose of protecting defendant's published interstate rates, which plaintiff was seeking to evade, counsel say that this statement is manifestly disingenuous. And in order to show this they say:

"There was no obstacle to the collection of the interstate rate on shipments delivered on the tracks of the Pennsylvania or the Big Four, and there was no way in which plaintiff could evade the payment of that rate if the defendant chose to require its payment."

This record, and plaintiff's own petition, show that the plaintiff did find a way to evade the payment of the interstate rate, which "the defendant chose to require." The petition shows that plaintiff obtained from the State Court a *mandatory injunction* "enjoining and ordering the defendant, among other things, to deliver immediately upon their arrival at Louisville, Ky., to the Pennsylvania Company, upon the payment of freight charges based on

the intrastate rates, and on the tracks controlled by the Pennsylvania Terminal Railway Company in Louisville, Ky., all cars of cross-ties which the defendant may receive consigned to this plaintiff, care of Pennsylvania Company." And, says the petition "said order of injunction now is and has been at all times since it was entered, in full force and effect." (Record, 6.)

This mandatory injunction was a very decided "*obstacle* to the collection of the interstate rate on shipments delivered on the tracks of the Pennsylvania." And it was only after that injunction was granted at plaintiff's instance that the defendant issued to its agents a circular of which plaintiff has greatly complained, directing its agents not to ship cross-ties consigned to plaintiff "*care of Pennsylvania Company*," but to ship them only to plaintiff at Louisville; defendant's purpose being of course to prevent these cars of ties being delivered to the Pennsylvania Company, when it was satisfied that if thus delivered the cars would be run out of the State with the ties in them. And fearing that there might be another application for a mandatory injunction in a different form, requiring defendant absolutely to deliver all cars to the Pennsylvania or the Big Four on plaintiff's demand whatever might be the form of the billing, the defendant insisted on loading the ties into its own cars, believing that it could then refuse, and that the court would not require it, to deliver its own cars into the possession of the Pennsylvania Company (under the principle settled in *Louisville & Nashville Railroad Co. v. Central Stock Yards Co.*, 212 U. S. 132). And it insisted that

as plaintiff claimed these shipments to be intrastate shipments, then defendant's cars must stop at Louisville and be there unloaded. And, while it is true, as counsel say, that a carrier can not by breaking bulk make that an intrastate shipment which would otherwise have been an interstate shipment, yet, as plaintiff claimed that the shipments were intrastate, and that the transportation was to end at Louisville, defendant did, and had the right to do, all that was in its power to see that the shipments were what they were claimed to be, and to prevent its own rolling stock from being used in the execution of a subterfuge.

Counsel say that the petition alleges that after the interstate rates and intrastate rates were made the same, in compliance with the order of the Interstate Commerce Commission, defendant continued to refuse to permit its cars to leave its line, and they say this is not denied in the answer, the denial being merely that this was *maliciously* done. This again is simply a technical criticism which counsel make upon the pleading. The second amended petition alleged that since the order of the Interstate Commerce Commission became effective "the defendant has continued to wilfully and maliciously annoy and harass the plaintiff as alleged in the petition," and then adds *as a specification of this* that "defendant has continued to wilfully and maliciously refuse to deliver upon the tracks of the Pennsylvania Terminal Railway Company its cars loaded with ties consigned to plaintiff in care of the Pennsylvania Company," etc. (Record, 33.) The answer of defendant denies "that it

has continued to wilfully or maliciously *or at all* annoy or harass plaintiff, as alleged in the petition, *or at all*, or has maliciously refused to deliver upon the tracks of the Pennsylvania Terminal Railway Company its cars loaded with cross-ties," etc. (Record, 42.) Thus it denies in the most complete way possible the general allegation that it has continued maliciously, *or at all*, to harass plaintiff as complained of in the petition; but counsel's criticism is evidently based on the fact that when defendant, after denying in this way the general charge, came to deny the specification about refusing to deliver the cars, it failed to repeat, after the word maliciously, the words, "*or at all*"; though it will be observed that as to the charge that it continued wilfully to refuse to accept cars of the Pennsylvania Company for loading, the answer does deny that "it has continued to wilfully or maliciously, *or at all*, refuse to accept cars of the Pennsylvania Company or cars under control of the Pennsylvania Terminal Railway offered to defendant for shipment of plaintiff's ties to Louisville" (Record, 43). In other words, counsel have simply picked out one allegation in this long answer where defendant failed to insert in its denial the words, "*or at all*," and on this they base the statement that defendant does not deny that even after the Interstate Commerce Commission had required the interstate rate and the intrastate rate to be the same, defendant continued its practice of refusing to allow cars to go through to destination loaded with ties.

Before concluding this subject, and in connection with the circular which defendant issued to its agents after

the mandatory injunction was issued, counsel in their brief (page 13) say this rendered it impossible for plaintiff to ship to its Louisville customers, such as the Louisville Street Railway. But it is perfectly manifest that the circular had no such effect. It was manifestly dealing with shipments to, or in care of, other railroads entering Louisville, and not with local concerns in Louisville; and plaintiff's President, Mr. Bush, though testifying that when he got the circular he went to the officials of defendant to inquire what it meant, admits on cross-examination that he did not even ask if it meant that he could not ship to local customers at Louisville. And when asked why it was, if he went to inquire what it meant, he did not ask if it meant to forbid his shipping to these local customers, his only response was that he construed it literally to mean that he could not. (Record, 140.)

VI.

On the subject of that part of the damages plaintiff was allowed to recover because defendant refused to allow its cars to be taken out of its possession and sent into other States on other lines, counsel say defendant did not *plead* that this would deprive it of its property without due process of law, but made this federal question on motion for new trial. But this court has expressly held that such a question does not have to be pleaded, and that it may be made on a motion for a new trial (*Chicago, Burlington & Quincy Railroad v. Chicago*, 166 U. S. 226, 231), and the profession have a right to rely on rulings

of this kind made by the court on such questions of practice.

Again counsel say this question was not urged in the *petition for rehearing* filed in the Court of Appeals of Kentucky. But there is no law, rule, or practice, that requires a petition for rehearing to be filed at all—much less that every question in the case shall be argued in it if one is filed.

They say also this question was not “pressed” upon the motion for new trial. They do not mean it was not assigned as a ground for the motion—for it was—but simply that it was not pressed in the *argument* on the motion. But there is no rule requiring a motion for new trial to be argued at all, either orally or by brief; and many of them are not argued at all; and if one is argued, counsel can argue what questions they please, without incurring the penalty of waiving any point they may not argue.

As to counsel’s reference, on the merits of this question, to *Michigan Central R. R. Co. v. Michigan R. R. Commission*, 236 U. S. 615, 631, the answer is that that case simply held that a certain rule of the State Railroad Commission as to the handling of cars was a reasonable rule, thus bringing the case within the principle of *Louisville & Nashville Railroad Company v. Central Stock Yards*, 212 U. S. 143, and the court decided the case expressly upon that ground. But in the case at bar there was no such rule involved. The law on that subject in Kentucky stands today exactly as it did when the *Central Stock Yards* case (which arose in Kentucky) was decided.

VII.

There are many other matters involved in the brief of counsel for plaintiff, upon which we are in absolute disagreement. But of course it is not the purpose of this reply brief to reargue the whole case, but simply to reply to matters in the brief of opposing counsel, which seem not to have been sufficiently anticipated in our original brief.

HELM BRUCE,

For Plaintiff in Error.

H. L. STONE,

Of Counsel.

April 27, 1916.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 356.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

OHIO VALLEY TIE COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error to the Court of Appeals of Kentucky, to review a judgment of that court affirming a judgment of the Jefferson Circuit Court at Louisville, Ky., for \$56,971.56, based upon the verdict of a jury for that amount.

The action was brought by the Ohio Valley Tie Company, the defendant in error, against the Louisville & Nashville

Railroad Company, the plaintiff in error, to recover damages for the injury to plaintiff's business, which was that of buying, selling, and shipping railroad cross-ties. For convenience the defendant in error is referred to in this brief as the plaintiff and the plaintiff in error as the defendant.

The plaintiff alleged that the damages claimed resulted from a combination of acts committed wilfully and maliciously for the purpose of injuring the plaintiff's business and driving plaintiff from the market as a buyer of cross-ties in competition with defendant. The action was in the nature of an action for an assault on plaintiff's business. The jury stated in its verdict that it awarded \$50,000 on account of injury to business, \$5,000 for injury to cross-ties, and the remainder for expenses incurred by reason of the wrongful acts, including counsel fees of \$1,000, which it was alleged in the petition were contemplated by defendant as a part of the damages which would result from its malicious acts.

The jury was permitted by the trial court to consider, in arriving at its verdict, four acts of the defendant, committed wilfully and maliciously with the intent to injure plaintiff's business and to prevent it from buying ties along the line of defendant's right of way, to wit:

1. The maintenance of excessive and unreasonable rates condemned by the Interstate Commerce Commission;
2. The failure and refusal to furnish cars requested by plaintiff for shipment of its ties, when it might, by the exercise of proper diligence, have so furnished the cars for such shipments without interference with the rights of others;
3. The refusal to accept the cars of another carrier which plaintiff tendered for shipment of its ties when defendant's own cars were not available, and when defendant was accustomed to accept the cars of other carriers when tendered by other shippers under substantially similar circumstances and conditions; and

4. The requirement that plaintiff should transfer and unload cars arriving over defendant's line at Louisville, and the refusal to allow such cars to go forward on connecting lines, while permitting the shipments of other persons to go forward on its cars on connecting lines under substantially similar circumstances and conditions.

Of these acts the first relates solely to interstate shipments and the others to both interstate and intrastate shipments.

The rates referred to were proportional rates applicable only to shipments to Louisville for points beyond in other States. The Railroad Commission of Kentucky, by a general order made in the year 1905, had prohibited the railroads from charging higher rates on intrastate shipments of cross-ties than they charged on such shipments of lumber, and defendant had complied with that order (Rec., p. 67). The defendant filed a special demurrer to two parts of the original petition: (1) to so much of the petition as complained of the alleged excessive charges on 89 cars of cross-ties, because it appeared from the petition that another action was pending in the same court between plaintiff and defendant, seeking to recover for the same alleged wrong, and (2) also to so much of the petition as complained of defendant's alleged wrong in ~~charging~~ ^{charging} unreasonable rates on interstate shipments of cross-ties because under the act of Congress entitled "An Act to Regulate Commerce," approved February 4, 1887, and its various amendments, the only tribunal having any power or right to give redress for such alleged wrongs is the Interstate Commerce Commission. The rates on the 89 cars of ties involved in the other action in the state court were finally excluded from the consideration of the jury (Rec., p. 61), and need not be considered here. The court overruled the first paragraph of that demurrer, but sustained the second paragraph upon the ground that the Interstate Commerce Commission had the exclusive right to determine whether or not certain interstate rates were unreasonable.

At the time this action was instituted there was pending before the Interstate Commerce Commission a complaint by which the plaintiff attacked the proportional rates on cross-ties from points in Kentucky and Tennessee to Louisville "for beyond," and sought reparation in the sum of \$6,198 on account of extortionate charges collected in the past on 91 carloads of ties to which those rates applied. April 8, 1912, prior to the filing of defendant's answer in this action, the Commission in that proceeding filed a report condemning the rates under which the shipments were made on account of which plaintiff's claim of \$6,198 had arisen and awarded reparation for that amount, and plaintiff thereupon filed an amended petition setting up those facts (Rec., p. 23). While plaintiff alleged in the amended petition that the rates condemned by the Commission were the same interstate rates referred to in the original petition, it also alleged that after the complaint was filed before the Commission additional shipments were made by plaintiff to which those rates were applied. To that pleading defendant did not file a demurrer, but it did by its answer deny that the rates so condemned by the Commission were unreasonable or were wilfully or maliciously published (Rec., p. 41). Defendant by its answer further denied that it had wilfully or maliciously delayed to furnish cars for plaintiff's shipments, or to accept cars of the Pennsylvania tendered for that purpose, and also alleged that since the institution of this action plaintiff had prosecuted to judgment the action to recover alleged excessive charges on 89 cars of cross-ties.

Upon the trial the defendant objected and excepted to the instructions given by the court, but did not attempt by those objections or exceptions at that time to raise any federal question (Rec., p. 59). Upon its motion for a new trial defendant attempted to raise a federal question as to that part of the first instruction given, which authorized the jury to consider as an element of damage the action of defendant in refusing to permit its cars to leave its line when loaded with

plaintiff's shipments, provided they should find that defendant was accustomed to permit its cars to leave its line when loaded with the shipments of other shippers under substantially similar circumstances and conditions (Rec., p. 47). While defendant at the time did not by its objections or exceptions to instructions given attempt to raise any federal question, it did attempt upon the trial to raise certain federal questions by its requests for instructions, as shown by the following excerpt from the bill of exceptions (Rec., pp. 57-58):

"1. The court instructs the jury that it cannot in this action allow any damages to plaintiff on account of defendant having charged to and collected from plaintiff unreasonable rates of freight for the carriage of interstate shipments of cross-ties." (And at the time defendant offered this instruction No. 1 it said to the court in writing: In offering this instruction defendant relies upon the federal act to regulate commerce, approved Feb'y 4, 1887, and the various amendments thereof, and insists that this court has no jurisdiction to consider or determine whether or not the rate on an interstate shipment of freight is unreasonable, and if so what damage the shipper has been caused thereby, unless and until the questions of the reasonableness of the rate and of the amount of the damage have been by court submitted to and heard and determined by the Interstate Commerce Commission.)

"2. The jury are instructed that they cannot allow plaintiff as damages anything on account of the fact that defendant charged to and collected from it the rate upon the 5th-class freight for the shipment of cross-ties involved in the action of Ohio Valley Tie Co. *vs.* L. & N. R. R. Co. in the Jefferson Circuit Court, wherein judgment was given in favor of plaintiff for certain alleged excess charges of freight, and which judgment was appealed to the Court of Appeals, and which case was afterwards carried to the Supreme Court of the United States, where it is now pending." (And at the time defendant offered this instruction No. 2, it said to the court in writing: In

moving the court to give the jury this instruction, defendant relies upon the federal act to regulate commerce approved Feb'y 4, 1887, and all amendments thereof, and insists that it is shown both by the record in the action referred to and in the present action that the shipments of cross-ties referred to in that action were interstate shipments, and that the question of the reasonableness of the rates therein involved had never been submitted to the Interstate Commerce Commission, nor determined by it. And that this court has no jurisdiction to determine the question of the reasonableness of said rates, nor the question of the damages, if any, resulting from charging the same. And defendant also insists that plaintiff having recovered judgment on account of the charges of rates involved in that action, cannot further recover any additional sum herein, based on the same alleged wrongful acts.)

"3. The court instructs the jury that defendant, Louisville & Nashville R. R. Co. had a right to keep its cars on its own tracks, and it was not therefore guilty of any wrong in refusing to allow its cars to go off its own tracks.

"4. The court instructs the jury that under the federal act to regulate commerce, the defendant railroad company was required by said act to charge and to collect from all shippers of interstate traffic the rates of freight fixed by its tariff which was at the time of shipment on file and in effect with the Interstate Commerce Commission at Washington, and it would have been a violation of law to have charged or collected from any such shipper a rate different from that which, at the time of the shipment, was fixed by such railroad company's tariff, then on file with the Interstate Commerce Commission and in effect or to have connived at any arrangement whereby the payment of the rate fixed by such tariff should be evaded."

Only the first and fourth of the requested instructions need now be considered, as the court at the close of the argument excluded from the consideration of the jury the rates to which the second instruction related (Rec., p. 61),

and no federal question was attempted to be raised by the third requested instruction.

When defendant reached the Court of Appeals of Kentucky it did not rely upon the alleged errors of the trial court in giving and refusing instructions, but insisted in that court upon the face of the pleadings that it was the duty of plaintiff to elect whether it would go to the Interstate Commerce Commission for its damages or would go to the courts, and that as plaintiff had elected to go to the Commission for damages it was compelled to claim all its damages before the Commission. To this contention the court made answer as follows (Rec., p. 219):

"We do not believe this position is tenable for three reasons: (1) This objection should come by way of a plea in abatement; and (2) the Interstate Commerce Commission as to damages is not a court, and its finding in that regard is evidential merely—neither binding nor conclusive; and (3) the instructions of the court prevent an allowance of anything for excess freight or any damage by reason of the act of charging excess freights."

The court also said in the same connection:

"Manifestly the action in the state court, and the complaint before the Commission were of a special nature, seeking special relief not obtainable elsewhere or otherwise. But this action is to recover general damages as a result of numerous wrongful acts, and although the overcharges which form the basis of the special suit and the complaint above referred to, are among the many wrongs alleged in the petition, we cannot see how judgment or proceedings in the special actions should operate as a bar to the prosecution of this, or the fact that they were then pending, could serve to abate it. Although they were between the same parties, the causes of action were not identical."

The assignments of error are twelve in number, but they may be reduced to six propositions:

(1) That it was error to award damages for the same wrongs for which the Interstate Commerce Commission had awarded damages after plaintiff had accepted payment of the damages so awarded; (2) that the court erred in holding that defendant, by failing to file a plea in abatement, waived its right to claim that plaintiff elected to demand all its damages in the proceeding before the Commission; (3) that the court erred in holding that the Jefferson Circuit Court had jurisdiction of this action in so far as plaintiff seeks to recover damages on account of a violation of the federal act to regulate commerce; (4) that the court erred in approving the refusal of the trial court to instruct the jury that it could not in this action allow any damages to plaintiff on account of defendant having charged to and collected from plaintiff unreasonable rates of freight for the carriage of interstate shipments of cross-ties; (5) that it was error to approve the refusal of the trial court to instruct the jury that it would have been a violation of the federal act to regulate commerce for defendant to collect less than the published rate; (6) that the approval of instructions to the jury authorizing a recovery because of defendant's refusal to permit its cars to leave its line deprived defendant of its property without due process of law.

The two principal grounds relied upon for reversal are: (1) The payment of the order of reparation was a bar to this action, and (2) the state court did not have jurisdiction of the action.

THE EVIDENCE.

While this court is not concerned with the sufficiency of the evidence to support the verdict, or as to whether or not the damages are excessive, a brief review of the evidence is necessary to a clear understanding of the grounds upon which defendant relies for a reversal of the judgment and to enable the court to determine whether or not defendant

has been deprived of any federal right which was "specially claimed" in the state court.

The petition in this action was filed December 9, 1911, in the Jefferson Circuit Court at Louisville, Ky. On September 15, 1911, plaintiff had filed before the Interstate Commerce Commission the complaint hereinbefore referred to, attacking defendant's published interstate rates on cross-ties from points in Kentucky and Tennessee to Louisville when the shipments were destined to points beyond Louisville, and praying for an order of reparation in the sum of \$6,198.00 on account of unreasonable charges on 91 cars of cross-ties shipped within two years prior to the filing of the complaint, the amount named being the excess of the freight charges on such shipments over what the charges would have been if the defendant had applied its lumber rates. The rates in fact applied were the fifth-class rates, cross-ties being rated fifth class, and defendant having refused to give them a commodity rate, as it had done in the case of lumber, the result being that in some cases the rates charged on cross-ties were four times as great as the rates on lumber made from the same kind of wood from which the ties were made.

To illustrate, from Smiths Grove, Ky., to Louisville, Ky., "for beyond," the interstate rate on lumber was 8 cents per 100 pounds, while the interstate rate on cross-ties was 32 cents. A cross-tie of the size which plaintiff sold to the Pennsylvania Railroad weighs about 200 pounds, and the value in Louisville of a whiteoak tie of that size was 82 cents at the time of the trial, while the value of ties of the same size made of inferior woods, and known as creosote ties, was only 55 cents each; and it appeared that a large part of plaintiff's shipments were of ties of that value. The freight charges on such a tie shipped from Smiths Grove to Louisville in interstate commerce was 64 cents, or 9 cents more than the value of the tie at Louisville. The value per thousand feet of quarter-sawed oak is almost four times the value of oak cross-ties, and a car of quarter-sawed oak

worth \$750.00 could be shipped from Smiths Grove to Louisville, when destined to points in other States, for \$32.00, while the freight charges on a car of whiteoak cross-ties worth in Louisville \$200.00, or a car of creosote ties worth in Louisville \$137.50, would be \$160.00. The same ties when destined to Louisville for delivery there were charged only \$32.00, the same as lumber (Rec., p. 111). On 89 cars of ties freight charges of \$11,396.64 represented an excess of \$8,127.63 over what the charges would have been at the lumber rate (Rec., p. 2).

On January 13, 1888, the Interstate Commerce Commission, in the case of *Reynolds vs. Western N. Y. & Pa. Ry. Co.*, 1 I. C. C., 393, 400, made an order requiring the carrier to cease and desist from charging a higher rate for the transportation of cross-ties between certain points than it charged for the transportation of lumber between the same points at the same time. In that case the Commission said (Rec., p. 95):

"Rates established by a common carrier under the influence of a desire to keep upon its line a material for which the road itself has use, or to keep the price thereof low for its own advantage, cannot be justified either in morals or in law. Every party who produces such a material is entitled to sell it when he wishes, in the best available market, and the common carrier has no right to prevent his doing so by disproportionate or unreasonable rates. This the defendants in the present case have been attempting to do."

While the report of the Commission in that case was not permitted to go to the jury as evidence, because it was filed in a proceeding to which the defendant in this case was not a party, the report is in the record (Rec., pp. 90, 95).

The report of the Commission in the case of *Chicago Car Lumber Co. vs. Louisville & Nashville R. Co.*, 19 I. C. C., 438, was, however, admitted as evidence, and in that case, which was decided October 10, 1910, the Commission said, p. 439:

"The Commission has repeatedly held that the rate on ties should not exceed the rate on lumber from which they are made; and while the defendant does not always equalize lumber and tie rates, it has usually done so when requested by complainant." (Rec., p. 89.)

In the case in which the order of reparation referred to in the amended petition was entered, the defendant made only a formal defense, as it offered no evidence and presented no argument (Rec., p. 101).

In view of the repeated rulings of the Interstate Commerce Commission and of the general order of the Railroad Commission of Kentucky made in 1905, prohibiting higher rates on cross-ties than on lumber, to which we have referred, the plaintiff believed, when it began to do business on defendant's line in 1908, that it would have the same rates on cross-ties that were given on lumber, and Mr. Bush, the plaintiff's president, says that he went into business on the line of the defendant on the supposition that the lumber rate applied to ties (Rec., pp. 66, 67). During 1908 and 1909 plaintiff shipped approximately 2,500 carloads of ties from points on defendant's line in Kentucky to points in other States, and on those shipments plaintiff paid the lumber rate. In February, 1910, however, defendant began to charge the fifth-class rate, although that had been all the time the published rate (Rec., p. 73). The defendant did not explain why, for two years after plaintiff began business, it failed to apply its published rates to plaintiff's shipments of cross-ties, but it seems clear that defendant had not expected ties from the fifth class, hoping thereby to deter persons on its line from shipping ties, and that the real reason it had not collected the fifth-class rate was that it knew that if complaint should be made it would be required to give cross-ties a commodity rate not higher than the lumber rate, and no doubt thought it wise not to invite a complaint so long as shipments were not greater in volume than they then were. It probably believed also that as the charging of a

higher rate on ties than on lumber had been so severely condemned by the Commission it would be quite safe in applying the lumber rate, although it was departing from its published tariff. When plaintiff discovered that defendant was assessing the fifth-class rate on shipments of cross-ties which it was then making to the Nickel Plate (New York, Chicago & St. Louis Railroad) it began to ship the ties to the "Ohio Valley Tie Company," in care of the Big Four Railroad, and then to reconsign the cars to the Nickel Plate, *first notifying the defendant that it intended to so consign the cars*, and upon the ties so shipped the defendant for some time charged only the lumber rate (Rec., p. 75). Before that change, however, in the method of handling those shipments defendant had collected freight charges at the fifth-class rate which exceeded in the sum of \$7,898.00 the freight charges which would have accrued if the lumber rate had been charged. The plaintiff presented a claim for that amount, and defendant paid \$1,700.00 of the claim, but refused to pay the remaining \$6,198.00, which was the amount for which plaintiff sought reparation by its complaint filed with the Interstate Commerce Commission in September, 1911.

After defendant began to assess the fifth-class rate on ties shipped to Louisville for purchasing carriers in care of other carriers plaintiff changed its contracts with the Pennsylvania and the Big Four so as to provide for delivery of ties to them at Louisville, as they had their own terminals there. After this was done defendant in August, 1911, refused to deliver several cars of cross-ties shipped by plaintiff and billed to the Pennsylvania at Louisville, unless plaintiff would pay the fifth-class rate, and plaintiff thereupon procured an injunction requiring the delivery of the cars. On 89 other cars, however, plaintiff had paid the overcharges demanded, which amounted to about \$8,100.00, and brought suit in the state court to recover the amount (Rec., p. 79). Thereafter, defendant charged only the lumber rate on ties billed to the Pennsylvania Railroad Company, but it re-

ired the ties to be unloaded and transferred to other cars, placing upon plaintiff the burden of transferring the ties (Rec., p. 81). Plaintiff then tendered Pennsylvania cars for the shipment of ties, but defendant refused to accept those cars, although it had been the custom of defendant to accept the cars of the Pennsylvania for such shipments prior to that controversy (Rec., p. 82).

Defendant about that time refused to continue to permit ties consigned to it in care of the Big Four for reconsignment to the Nickel Plate to move to Louisville upon the lumber rate, and plaintiff was therefore compelled to give up the Nickel Plate as a customer, as it could not afford to pay the extortionate rates demanded, even though it knew it could finally get back the excess over the lumber rate (Rec., p. 77). September 29, 1911, defendant issued a circular to its agents in Kentucky instructing them that shipments of ties consigned to plaintiff in care of various railroads were not to be accepted, but stating that ties consigned to plaintiff to any of the railroads named could be accepted, it being stated in the circular that it was very important that these instructions "be followed to the letter." Upon inquiry plaintiff was informed that consignments to the Ohio Valley Tie Company at Louisville meant shipments to the team track of the defendant and nothing more (Rec., p. 103). Plaintiff had several large customers at Louisville, other than the trunk lines referred to, the Louisville Street Railway being among the number, and this circular made it impossible for plaintiff to ship to those customers, as it could not afford to unload the ties on the team track and haul them across the city to the yards of the purchasers, on whose sidings defendant had formerly been accustomed to make deliveries for plaintiff.

Plaintiff's controversy with defendant began in the summer of 1911, and although from September, 1910, to September, 1911, plaintiff had handled 1,300,000 ties, yet from September, 1911, to September, 1912, because of reduced capital it handled less than 1,000,000 ties (Rec., p. 117).

Plaintiff's business had steadily increased, both in volume and profit, from the time it began to purchase ties on defendant's line in 1908, and it had never shown a loss for any year prior to the year ended September 1, 1912. At the time plaintiff's controversy with defendant began, its investment in timber and ties on that part of defendant's line from which defendant sought to deter plaintiff from making shipments amounted to \$75,000.00 (Rec., p. 78), and that investment defendant tied up not only by continuing to keep in effect the extortionate fifth-class rate on ties, so that plaintiff was compelled to give up its most valuable customer, but by refusing to furnish cars for the shipment of plaintiff's ties, or to accept cars of other lines for that purpose (Rec., pp. 118, 121). Not only did defendant refuse to either furnish its own cars or to accept Pennsylvania cars for plaintiff's shipments, but in the case of 34 Pennsylvania cars inadvertently accepted by some of defendant's agents for plaintiff's shipments defendant unloaded the ties when they reached Louisville and loaded them on defendant's cars before they were switched to the Pennsylvania tracks, being willing to incur that expense in order to impose upon plaintiff the expense of transferring the ties to Pennsylvania cars (Rec., p. 114). The result of this persistent attack upon plaintiff's business was to convert a profit of \$28,000.00 for the year ended September 1, 1911, into a loss of \$27,000.00 for the year ended September 1, 1912 (Rec., pp. 65-66).

The only excuse given by defendant for refusing to either furnish cars for plaintiff's shipments or to accept the cars of the Pennsylvania Railroad when tendered for that purpose or for requiring plaintiff to unload its shipments at Louisville and reload them in Pennsylvania cars, is that it was merely seeking to protect its interstate rates. This claim, however, is manifestly disingenuous. There was no obstacle to the collection of the interstate rate on shipments delivered on the tracks of the Pennsylvania or the Big Four, and there was

no way in which plaintiff could evade the payment of that rate if the defendant chose to require its payment. Besides, the defendant could not by breaking of bulk make that an intrastate shipment which would otherwise have been an interstate shipment, it being provided by Section 7 of the Act that "no break of bulk, stoppage or interruption" made by a common carrier in the movement of traffic "shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any provisions of the Act." It was just as much the duty of defendant, therefore, to collect the interstate rate on each of the shipments which was taken from defendant's cars and loaded upon the cars of the Pennsylvania or the Big Four as it was to collect that rate upon shipments which went forward in the same cars in which they reached Louisville. It was alleged in plaintiff's second amended petition that after the interstate rates and the intrastate rates were made the same, in compliance with the order of the Interstate Commerce Commission, defendant continued to refuse to permit its cars to leave its line (Rec., p. 33), and this was not denied, the denial being merely that this was *maliciously* done (Rec., p. 42). But if an issue was made as to that matter the question of fact was for the State court, and that court, as we must assume, found every fact necessary to support the conclusion that defendant refused to permit its cars to leave its line when loaded with shipments made by plaintiff while permitting its cars to leave its line when loaded with similar shipments made by other persons. There was testimony tending to show that defendant's practices continued to be the same, after the interstate rates were made the same as the intrastate rates, as they had been before (Rec., pp. 122, 143), and that defendant wilfully refused to furnish cars is established by undisputed testimony (Rec.,

pp. 121, 141-143, 150-152, 161, 165). The fact that defendant did not wish to permit its cars to leave its line could not justify its refusal to furnish cars altogether, since it did require such of its cars as it did furnish to be unloaded at Louisville. It is also difficult to understand how the defendant's duty to protect its maliciously published rates could justify its refusal to accept the cars of the Pennsylvania Railroad tendered for plaintiff's shipments when defendant was refusing to furnish its own cars for that purpose. If such cars had been accepted defendant would have known without doubt that the cars were going forward to points in other States, and it would have been defendant's duty, according to its theory, to collect the interstate rate if the shipments were in fact interstate shipments. The refusal to furnish cars for plaintiff's shipments shows that the real purpose of the publication of the extortionate rates was to deter plaintiff from shipping ties. While plaintiff sought to avoid the payment of defendant's maliciously published rates it did so in a lawful way, and what it did was upheld by the Court of Appeals of Kentucky (*Louisville & Nashville Railroad Co. vs. Ohio Valley Tie Co.*, 148 Ky., 718). If that court erred defendant had a remedy in this court.

The defendant in fact acquiesced in plaintiff's claim that the delivery of the ties to the purchasers at Louisville made the shipment of such ties intrastate shipments, but in order to compel plaintiff to abandon that method of handling the ties, and to pay the interstate rates, it required the ties to be unloaded when they reached Louisville. Plaintiff asserted a right which defendant recognized, but defendant sought to compel plaintiff to abandon that right by imposing unlawful burdens upon the exercise of the right. There was no attempt on plaintiff's part to conceal the fact that the purchasers intended to move the ties over their own tracks to points in other States, and it was not necessary for defendant, therefore, to require the ties to be unloaded in order to police the shipments. Besides, as already suggested, the mere breaking of bulk could not change the character of the shipments.

The claim made for defendant, therefore, that its refusal to furnish cars to plaintiff or to accept the cars of other lines when tendered for plaintiff's shipments had no other purpose than to protect defendant's interstate rates is unfounded. The jury has found that those rates were wilfully and maliciously kept in effect with the knowledge that they were unreasonable and with the intent to injure plaintiff's business, and we must accept that finding as true. The defendant claims, in effect, therefore, that it had the right to impose upon plaintiff burdens otherwise unlawful for the purpose of forcing plaintiff to so handle its shipments that it could no longer have any ground to claim that they were interstate shipments, in order that plaintiff might thus be compelled to pay defendant's maliciously published rates, which defendant knew that it would in the end have to refund to plaintiff to the extent that they exceeded the lumber rates. But defendant probably assumed that plaintiff would never be able to recover the amount which it was compelled by defendant to pay for transferring the ties from defendant's cars to cars of the Pennsylvania railroad.

Not only did the defendant know that the Interstate Commerce Commission had repeatedly held that the rates on cross-ties ought not to exceed the rates on lumber, but its president, Milton H. Smith, testified that the purpose of defendant in maintaining the extortionate rates on cross-ties was to prevent or hinder their movement. Mr. Smith, who was introduced as a witness by plaintiff, was asked the question:

"Has it been your purpose, Mr. Smith, to prevent the movement of cross-ties off your lines?"

And in answer he said:

"That has been the effect and tendency to keep the rate on ties as high as we could, to let them move out—if they moved at all—slowly" (Rec., p. 155).

This statement of defendant's president furnishes the key to all that defendant did. That, however, which in its

inception was merely an attack upon the business of buying ties became in the end also a personal controversy with plaintiff.

The claim made by counsel for defendant that the controversy between plaintiff and defendant related to rates alone is wholly without foundation. While the first blow struck by defendant at plaintiff's business was through the maintenance of unreasonable rates, yet when plaintiff found a lawful way to avoid the effect of that blow defendant used other instruments to accomplish the same malicious purpose.

The Court of Appeals of Kentucky said (Rec., pp. 214-215):

"In the case at bar every act referred to was established beyond controversy, that is, they were not denied, and there was substantial admission that the purpose was to prevent or hinder the movement of cross-ties off its road, and this, of course, meant the elimination of appellee as a competitor, and the destruction of its business. Appellant seeks to shift the blame for these drastic and arbitrary orders, and its refusal to furnish to appellee the same accommodations and facilities it was furnishing to other shippers of other commodities, by saying it was necessary to do so in order to circumvent appellee in the various steps which it was taking to avoid these orders and escape the effect of appellant's rules and regulations. But when it is remembered that these orders and rules and regulations were aimed at appellee alone, and to thwart it in the business which it had a perfect right to carry on, it becomes apparent that appellee was only exercising in a lawful manner its right of self-defense against the death-blows, time and time again directed at it by appellant. Its right to every privilege and facility for shipment which it requested is recognized and established by law, and they were at the time being afforded to all shippers of other commodities."

ARGUMENT.**I.**

The record presents no federal question, and the writ of error should be dismissed.

In his brief on motion to dismiss counsel for defendant states that he relies in this court on three federal questions. It is claimed by counsel that two of the questions arose on defendant's requests for instructions, and that the third question arose upon objections made to that part of the instructions given by the court which related to the refusal of defendant to permit its cars to leave its line.

The Court of Appeals of Kentucky did not consider any of defendant's requests for instruction or its objections to the instructions given, but by its assignment of errors defendant states that the court, by affirming the judgment, held, *in effect*, that the requested instructions were properly refused, and that the jury was properly instructed as to defendant's duty to permit its cars to leave its line.

(a) *The payment of the order of reparation as a bar.*—The first of the requested instructions does not state what the jury may consider but what it *must not* consider, and was on its face intended merely to supplement or explain the instructions given. The giving of those instructions, with the exception already noted, which is not important in this connection, is not assigned as error, and with that exception those instructions must be accepted as the law of this case. Besides, no federal question was raised by the formal objection made to the instructions given. It would have been error to give inconsistent instructions, and it cannot be assumed that defendant in requesting an instruction telling the jury *not* to consider certain things intended anything more than to ask the court to give the jury a caution or

warning. The requested instruction we are considering warns the jury not to "allow any damages to plaintiff on account of defendant having charged to and collected from plaintiff unreasonable rates of freight for the carriage of interstate shipments of cross-ties." The court, by the instructions given, carefully observed the distinction which counsel for defendant observed in his requested instruction, and instructed the jury that one of the facts which, if found to exist, would authorize a verdict for plaintiff was that the rates condemned by the Commission were *wilfully and maliciously maintained* with intent to injure plaintiff's business. As showing the meaning and significance of the word *maintained* attention is called to the fact that the jury was authorized to find for plaintiff if it believed that the rates were wilfully and maliciously *maintained* with intent to *deter plaintiff* from buying ties. The plaintiff in its original petition and amended petitions very carefully observed the distinction between *charging and collecting* unreasonable rates and *wilfully and maliciously publishing and maintaining* unreasonable rates, and the defendant showed that it also recognized this distinction.

In its original petition, referring to the repeated rulings of the Interstate Commerce Commission to the effect that the rates on cross-ties ought not to exceed the rates on lumber made from the same kind of wood from which the ties are made, plaintiff alleged (Rec., p. 4):

"But notwithstanding the fact that the Interstate Commerce Commission has many times and in all cases brought before said Commission, against the Louisville and Nashville Railroad Company, and other railroad companies, adjudged that it was and is extortionate and unconscionable for said railroad companies to charge more for hauling cross-ties in carload lots in interstate shipments than they charge for hauling lumber; and notwithstanding the fact that in all of the many cases brought before said Interstate Commerce Commission against the Louisville & Nashville Railroad Company, that Commission,

where it found that said railroad company had collected charges for hauling cross-ties in such shipments, in excess of the regular charges for hauling lumber in similar shipments, has ordered said railroad company to refund to the parties paying such excessive charges the amounts of so much of such charges as were in excess of the rates for hauling lumber, *the defendant has nevertheless wilfully, maliciously and persistently failed and refused and still fails and refuses to change the classification of cross-ties in its said interstate tariffs so as to take them from the fifth class and put them upon the lumber class, notwithstanding the fact that such change could be made in thirty days, or immediately with permission of the Interstate Commerce Commission.*" (Italics ours.)

The claim as to the intrastate rates charged, however, was based upon the fact that they were in excess of the established rates, and that the overcharges were *wilfully and maliciously withheld* from plaintiff, and as to those rates the plaintiff, after alleging that defendant wilfully and maliciously committed the acts thereafter set forth, further alleged (Rec., pp. 2-3):

"Defendant did charge and collect and caused to be charged and collected as compensation for hauling eighty-nine carloads of cross-ties, shipped from stations on said lines of said railroad company in Kentucky to Louisville, Kentucky, unlawful and excessive freight rates—that is to say, defendant charged and collected the sum of \$11,396.64 in freight charges, when in truth and in fact, the sum of \$3,269.01 was the total sum properly owing for hauling said cross-ties, according to the rates regularly fixed in the duly published intrastate tariff of said railroad company, and when defendant knew that any charge in excess of \$3,384.03 was unlawful and extortionate; and defendant refused and still refuses to refund the excessive sums charged and collected as aforesaid and plaintiff was compelled to bring suit and did bring suit, which is still pending, against said railroad company, to recover the amount of said excessive charges."

Defendant's special demurrer to the original petition was in two paragraphs, the first paragraph relating to that part of the petition which claimed damages, as defendant assumed, on account of the *collection* of unreasonable *intra-state* rates, and the second paragraph relating to that part of the petition which claimed damages on account of the *publication* of unreasonable *interstate* rates. As the defendant then recognized that distinction, we must assume that it was still in mind when defendant made its requests for instructions. Of course, the word *maintained* was used in the instructions in the sense of continued to publish and keep in effect, as the wilful and malicious refusal of defendant to withdraw or cancel its published tariffs was a wrong even though the tariffs may have been originally published in good faith. If counsel for defendant desired to raise the question that under the act to regulate commerce the *wilful and malicious maintenance* of rates did not create a cause of action separate and distinct from that created by the mere *collection* of rates he should have stated that as the ground of his objection to instruction No. 1 given by the court, and then assigned the giving of that instruction as error.

The *charging* of an unreasonable rate violates section 1 of the act to regulate commerce, which provides:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: * * *

As defendant has acquiesced in the instructions given as being the law of the case to the extent that they relate to the *maintaining* of unreasonable rates, it is not necessary to consider whether or not the *maintaining* of unreasonable rates was a violation of the act to regulate commerce.

The ground stated for defendant's request for its first instruction asked had no application whatever to the only rates referred to in the instructions given by the court, since those rates *had been* condemned by the Interstate Commerce Commission as unreasonable and damages *had been* awarded by the Commission on account of the charging of those rates, whereas the ground upon which defendant's instruction was requested assumed that the rates referred to therein had not been condemned by the Commission and that no damages had been awarded on account of the charging of those rates. Counsel for defendant admitted in his brief on motion to dismiss that the ground stated by him for his requested instruction No. 1 was "inapt and incomplete" (p. 37), and insisted that instead of saying that the court had no "jurisdiction" to award damages on account of the charging of unreasonable rates "unless and until" the Interstate Commerce Commission had found the rates to be unreasonable and had assessed the damages he really *intended* to say that the Commission *had* found the rates to be unreasonable and *had* awarded damages on account of the charging of those rates, and that the damages so awarded had been paid. He further insisted that in stating that the court had no jurisdiction to award damages on account of the charging of those rates until the question as to the reasonableness of the rates had been submitted "by court" to the Interstate Commerce Commission he had said something which was meaningless, and that the court should disregard the words "by court." As counsel for defendant thus concedes that the words used by him to assert his federal right were not only "inapt and incomplete," but were meaningless, he cannot complain that the state court so treated them.

To give this court jurisdiction the federal right here relied upon must have been "unmistakably" claimed in the state court. In *Ozley Stave Co. vs. Butler County*, 166 U. S., 648, 655, the court, by Mr. Justice Harlan, after quoting section

709 of Revised Statutes regulating the jurisdiction of this court upon writ of error to a state court, said:

"The words 'specially set up or claimed' imply that if a party intends to invoke for the protection of his rights the Constitution of the United States or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare 'specially,' that is, unmistakably, this court is without authority to re-examine the final judgment of the state court. This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a federal right is left to mere inference."

It must also appear that the federal right claimed here is the same federal right specially claimed in the state court.

In *Seaboard Air Line Ry. vs. Duvall*, 225 U. S., 477, 487, the court in an opinion by Mr. Justice Lurton said:

"It was the obvious duty of counsel, if they wished any particular construction of the Act to put the request in such definite terms as that the attention of the court might be directed to the point, and the record here should show that the right now claimed was the right 'specially set up' and denied by the Court."

In *Sweringen vs. St. Louis*, 185 U. S., 38, 46, upon which counsel for defendant relies, the court said that the claim of federal right must have been so referred to and mentioned as to show "that it was present in the minds of the parties claiming the right, or must have been in some way presented to the court."

The court can know what was in the mind of the party claiming the federal right only by what he said at the time, and there is not a suggestion in the record that defendant, when it requested its first instruction, had any thought of claiming that the payment of the order of reparation precluded plaintiff from recovering the damages sought in this action. If the ground stated for the instruction had any

meaning, that meaning was that the action was premature, but counsel for defendant now claims that he had no thought of insisting that plaintiff should have gone to the Commission for additional damages. Omitting the words "by court" the ground stated for the instruction shows that defendant had in mind other rates than those which the Commission had condemned, and on account of the charging of which it had awarded damages, and as the only rates to which the instructions given referred were rates which had been condemned by the Commission and on account of the charging of which reparation had been awarded by the Commission, both the trial court and the Court of Appeals were warranted in concluding that there was no ground for giving the requested instruction. The words "by court," however, cannot be disregarded, and in fact they are essential to give any meaning to the ground stated, since it could be said that *the court* had never submitted to the Interstate Commerce Commission the question as to the reasonableness of the rates, but it could not be said that the question had not been submitted to the Commission at all. Counsel says that the court must know that the words "by court" have gotten into the record by error, but they do appear in the original bill of exceptions. Of course, the ground stated with those words included, raises a frivolous question.

While it is not necessary in all cases that the claim of federal right should be asserted by pleading it is necessary that the facts on which the claim is based should be properly brought to the attention of the state Court, and that it should appear to the court that the party asserting the federal right is relying on those facts. It appeared from plaintiff's amended petition that the Interstate Commerce Commission had made an award of reparation in plaintiff's favor, but it did not appear that the order of reparation had been paid, or that plaintiff was relying on the order or its payment as a bar. On the contrary, plaintiff clearly indicated its intention not to rely on the order or its payment as a bar or an estoppel.

Although the order of reparation, if valid, was conclusive as to the reasonableness of the rates (*Mitchell Coal Co. vs. Penna. R. R. Co.*, 230 U. S. 247, 258) defendant by its answer joined issue both as to the reasonableness of the rates and as to the amount of the damages, and thus not only attacked the very foundation of the order but elected to re-open all the matters which it now claims were closed by that order. If defendant intended to claim that the order of reparation was conclusive against plaintiff as to the amount of the damages it should have conceded that the order was conclusive against defendant as to the reasonableness of the rates. Section 16 of the Act provides that the order of the Commission "shall be *prima facie* evidence of the facts therein stated," and defendant never at any time in the State Court asserted the right to have the order of reparation in this case treated as *conclusive* evidence against plaintiff as to any fact stated in the order. If defendant was entitled to have the order treated as conclusive against plaintiff as to the amount of the damages it was so entitled only upon condition that the order be treated as conclusive against it as to the reasonableness of the rates, and when it denied that the rates were reasonable it waived its right to claim that the order of reparation was conclusive against plaintiff as to the amount of the damages.

We also ask the attention of the court to defendant's "motions to exclude testimony" offered at the close of plaintiff's testimony. By these motions the defendant asked that all testimony as to the charging of unreasonable rates and the damages resulting therefrom be excluded from the jury because the *sole* right and jurisdiction to determine the reasonableness of the rates and the amount of damage done to a shipper by reason of the charging of an unreasonable rate was in the Interstate Commerce Commission (Rec., pp. 176-177). There was no suggestion that the jurisdiction of the Interstate Commerce Commission had been exhausted, but rather an invitation to plaintiff to go to the Commission

for additional damages, thus clearly waiving any claim that there could be no further recovery because the Commission had already awarded to plaintiff all the damages to which it was entitled.

While we have referred to the motions to exclude testimony to show that defendant did not intend to rely on the payment of the order of reparation as a bar the defendant cannot now base any claim of federal right upon those motions since there was no objection to the testimony when offered, and the action of the trial court upon the motions was not assigned as a ground for new trial.

Referring to a certain part of the testimony which included some of that embraced in those motions, the Court of Appeals said (Rec., p. 215):

"Appellant says it did not object to the testimony, because it did not then know how the court would instruct the jury with reference to it. But the practice for testing a ruling of the court, or the competency of evidence, is to object and except at the time."

And this is the established rule in Kentucky.

In *Berry vs. Evans*, 28 Ky. Law Rep., 22, 23, the court refused to consider alleged error in the admission of testimony because no objection was made *at the time* of its admission.

In *T. J. Moss Tie Co. vs. Myers*, 116 S. W., 255, there was an exception to the admission of testimony, but no objection, and the Court of Appeals of Kentucky said:

"The evidence must be objected to at the time as well as excepted to."

While the court may in its discretion exclude testimony to the admission of which no objection was made, the general rule is that a party who failed to object to the admission of testimony at the proper time cannot complain if the court refuses to grant his motion to exclude. *Miller vs. Montgomery*, 78 N. Y., 282, 286; *State vs. Forsha*, 190 Mo., 296, 326.

In the instant case the only excuse which defendant offers for its refusal to furnish cars is the claim that plaintiff was seeking to evade its interstate rates, and if the testimony as to the rates be excluded defendant is without even the semblance of a defense to that part of the action which seeks to recover damages for refusal to furnish cars.

Some of the testimony as to rates, however, if competent for no other purpose, was competent to show malice, and if any part of that testimony was competent the court did not err in refusing to exclude the entire testimony embraced in the motions.

But the refusal of the court to exclude the testimony was not assigned as a ground for new trial, and for that reason could not be considered by the Court of Appeals of Kentucky.

In *Acme Mills & Elevator Co. vs. Rives*, 141 Ky., 783, 787, the court in an opinion by Judge Miller, now Chief Justice, referring to an alleged error occurring during the trial, said:

"Unless the error of the circuit court is specifically made a ground for a new trial, it will be regarded as having been waived in that court, and is necessarily beyond the sphere of this court's supervisory jurisdiction, which is only to decide whether, on the grounds properly before it, the circuit court erred in its judgment."

Counsel for defendant relies upon *Meaux vs. Meaux*, 81 Ky., 475, 479, to show that his grounds for new trial were sufficient to call attention to the alleged error of the court in refusing to sustain his motions to *exclude* testimony, but in that case the testimony admitted was objected and excepted to at the time, and there was no motion to exclude. The only question, therefore, was whether or not it was necessary to set out the testimony in the motion for new trial or to describe it more specifically than by the statement that it was testimony the admission of which was "excepted" to at the time. The court did not hold that alleged error in admitting testimony was the same as alleged error in refusing to exclude testimony, or that testimony described as testimony objected to

at the time included testimony not objected to at the time.

Assuming, as we must assume, that the Court of Appeals of Kentucky failed to consider the alleged error of the trial court in denying defendant's motion to exclude testimony, not only because the testimony was not objected to when offered, but because that action of the court was not assigned as a ground for new trial, the claim of denial of federal right is not properly brought to the attention of this court, because the right was not claimed in the trial court as required by the state practice. *Louisville & Nashville Railroad vs. Woodford*, 234 U. S., 46, 51.

If, however, there were no other reason for disregarding the alleged error in refusing to exclude testimony the fact that the action of the Court of Appeals in failing to reverse upon that ground is not assigned as error in this court would be sufficient.

We also again ask the attention of the court to the statement made by counsel for defendant in support of its requests for instructions. Nothing could show more clearly than does that statement that the defendant never at any time relied or intended to rely in the trial court on the fact that plaintiff had elected to claim all its damages in the proceeding before the Interstate Commerce Commission or on the fact that damages had been awarded by the Commission and paid. This is shown not only by the fact that defendant insisted that the court could not award the damages sought in this action "unless and until" the amount of the damage had been submitted by court to and determined by the Interstate Commerce Commission, but by the fact that the defendant did insist that the judgment recovered in the state court was a bar to the recovery of the damages sought on account of the rates involved in the action in which that judgment was rendered.

But a conclusive answer to the claim that the payment of the order of reparation may be here relied upon as a bar to any recovery on account of the charging of unreasonable rates is found in the fact that payment was not pleaded or

otherwise relied upon in the trial court, and that the Court of Appeals of Kentucky did not consider the claim that payment was a bar, if in fact such a claim was made in that court, which does not appear. The Court of Appeals stated that the claim was that the *order* was a bar, no reference being made to its *payment* in that connection (Rec., p. 218). It may have been that payment was accepted on express condition that it should not affect this action. Besides, as this action for additional items of damage was being prosecuted when payment was made, there could be no presumption of an intention to waive any claim asserted in this action. Proof of payment when there was no issue as to payment amounted to nothing. Since payment, as defendant now concedes, was essential to give the order of reparation the effect of a judgment as a bar it was manifestly necessary for defendant to plead payment if it intended to claim for the order of reparation such an effect. If there had been a plea of payment it may be that plaintiff could have pleaded an estoppel. Plaintiff had no right to *wilfully* do anything to increase the damages, and therefore it was bound to accept the money when tendered, or to forego the right to any damage which it might thereafter suffer by not having the use of the money.

But counsel for defendant insists that this was an action under section 16 of the act to enforce an order of reparation, and that as the petition did not state that the order of reparation had not been paid, it did not state a cause of action. No attempt was made to enforce the order of reparation, and the amended petition setting up that order shows that the pleader had no thought of recovering the damages included in the order. If defendant is right in supposing that the wrong complained of was a violation of the Act to Regulate Commerce this was an action for damages within the meaning of section 16, and while, if that be true, the action may have been premature in that the special damages sought to be recovered had not been assessed by the Commission, yet that objection was waived.

Darnell vs. Illinois Central R. R., 225 U. S., 243, 245,

was an action brought in a circuit court of the United States to recover damages on account of the charging of a rate which had previously been found by the Interstate Commerce Commission to be unreasonable, and the action was dismissed on the ground that the declaration failed to allege that plaintiff had made application for reparation to the Interstate Commerce Commission, and that this right to reparation had been sustained by that body. The court, by Mr. Chief Justice White, on motion to dismiss the writ of error, after stating the facts, said:

"Under these circumstances it is clear that the question of whether the plaintiff was entitled to the relief prayed in the absence of an averment of previous action by the Interstate Commerce Commission involved merely the determination of whether there was a cause of action stated, and hence that under these circumstances this issue did not call in question the jurisdiction of the court below, as a federal court, becomes equally clear when it is considered that exactly the same question concerning the sufficiency of the averments to justify affording relief would have arisen for decision had the suit been pending in a state court of general authority having jurisdiction over the person. When the controversy comes to be rightly understood, it is obvious that its determination was within the scope of the jurisdiction of the court below, and that its decision on the issue presented is susceptible of being reviewed in the regular course of judicial proceeding and does not come within the purview of the authority to directly review in certain cases conferred upon this court by the act of 1891."

It is the established rule in Kentucky that the objection that an action is premature is waived if, without making the objection by demurrer or plea, the defendant pleads to the merits.

It was formerly the rule in Kentucky that a creditor could not sue to set aside a conveyance made by his debtor on the ground that the conveyance was made with the intent to defraud creditors "unless and until" the creditor had obtained

judgment and a return of *nulla bona*, and that rule being invoked by appellant in *Barton vs. Barton*, 80 Ky., 212, 214, upon appeal from a judgment setting aside such a conveyance, it was held that by joining issue on the merits without filing a demurrer to the petition the objection that there had been no return of *nulla bona* was waived. The court said:

"This is unlike a case where the court has no jurisdiction of the subject-matter, for in such a case no consent can give jurisdiction; but here the court had jurisdiction to adjudge whether a conveyance or transfer of property was fraudulent, provided certain steps had been taken, and a failure to raise the question as to whether such steps had been taken is akin to submission of the person to the jurisdiction where there has been no service of process, which may, in all cases, be done when the subject-matter may otherwise be inquired of by the court."

Behan vs. Warfield, 90 Ky., 151, is to the same effect.

If the failure to have the damages assessed by the Commission could be waived by failure to demur to the petition, of course the failure to allege that the damages assessed had not been paid could be thus waived. Therefore, if this be regarded as an action under section 16 of the act it is immaterial whether the petition be considered as defective because it failed to show that the order of reparation made by the Commission had not been paid or because the additional damages had not been assessed by the Commission.

The contention that the petition was bad because it failed to allege that the order of reparation had not been paid implies that the order of reparation, if it had not been paid, would have furnished a basis for the recovery of the damages sought in this action, and this completely negatives the idea that there was any inconsistency between going to the Commission for the rate damages and going to the state court for the general damages resulting from the combination of malicious acts of which plaintiff complained. Besides, if the

order of reparation was merely the basis for the recovery of additional damages it was immaterial whether or not it had been paid.

All other questions aside, however, it seems too plain for argument that neither the order of reparation nor its payment could be a bar to *this action* even if the order of reparation without payment had the force and effect of a judgment, which we insist that it did not have. There were various elements of damage involved of which the Interstate Commerce Commission would have had no jurisdiction, and the contention that the payment of the order of reparation operated as a bar to the entire action is so untenable as to be frivolous.

The fact that defendant did not press in the Court of Appeals of Kentucky the alleged error of the trial court in refusing to give its first requested instruction shows that it then recognized that its request for that instruction did not present the question which it now insists was presented. That the alleged error in refusing to give that instruction was not urged in the Court of Appeals of Kentucky is confirmed by the fact that counsel for defendant in stating in his petition for rehearing what he terms his "federal question" did not refer to the refusal to give that instruction (Rec., pp. 243-246).

Besides, the claim made in the Court of Appeals that the order of reparation was a bar to the entire action was inconsistent with the ground stated for the requested instruction, and the defendant cannot, after taking that position in the Court of Appeals, now shift its position again and return to the position which it had taken in the trial court.

But the refusal of the state court to recognize the *order* of reparation as a bar to the action, is not assigned as error. The error assigned is that the court refused to hold that the recovery of additional damages was barred by the *payment* of the order of reparation (assigned errors 1, 2, 3, Rec., pp. 252, 253).

(b) *Jurisdiction of state court.*—By its special demurrer

to that part of the original petition alleging as an element of damage the "publication" of unreasonable interstate rates on ties defendant claimed that the *only* tribunal which had jurisdiction to give damages on account of the "publication" of unreasonable interstate rates was the Interstate Commerce Commission. The trial court sustained that demurrer, but not on the ground on which it was based, the reason given by the court being the fact that the rates in question had not been specifically condemned by the Commission (Rec., p. 22). The fact that the court did not sustain the special demurrer on the exact ground on which it was asked to do so gave defendant no ground to except, and there was in fact no exception on its part.

In *Steele vs. Bryant & Co.*, 132 Ky., 569, the court struck out certain parts of plaintiff's petition and the plaintiff excepted. On appeal the defendant complained of this action of the court on the ground that the effect was to make the remaining allegations broader than before, but the court held that as he had failed to except his complaint of the ruling could not be considered.

After the plaintiff filed its amended petition setting up the fact that the Interstate Commerce Commission had specifically condemned the rates, and had fixed the extent to which the rates were unreasonable, by making an order of reparation, the defendant, without further objection to the jurisdiction of the court, filed its answer denying that the rates were unreasonable or were wilfully or maliciously published or maintained. Testimony tending to show that the rates were wilfully and maliciously published with knowledge on the part of defendant that they were unreasonable was admitted without objection, and while defendant subsequently moved to exclude that testimony that motion came too late to entitle defendant to have the testimony excluded. Besides, the denial of the motion, as we have seen, was not assigned as a ground for a new trial, and is not here assigned as error. Defendant by the ground assigned for the motion

to exclude the testimony insisted merely that the Interstate Commerce Commission *alone* had "jurisdiction" to award damages, but counsel says he meant that the payment of the order of reparation already procured by plaintiff was a bar, and that being true the use of the word "jurisdiction" was inapt. Therefore, even if the alleged error in refusing to exclude the testimony were now before the court for consideration it could not be considered as raising the question of jurisdiction of the state court.

Counsel for defendant also insists that the ground assigned for defendant's first requested instruction was intended to assert the claim that the payment of the order of reparation was a bar to the recovery of additional damages on account of the charging of unreasonable rates, and so the request for that instruction did not raise the question of jurisdiction.

As that question was not raised in the trial court, and as the Court of Appeals of Kentucky made no reference to the question in its opinion, the question is not before this court. Counsel insists that jurisdiction of the subject-matter could not be waived, and while we insist that the state court did have jurisdiction of the subject-matter yet if we are wrong in that, objection to the jurisdiction *as a federal question* could be and was waived.

No objection at any time was made to the jurisdiction of the state court as distinguished from the federal court, and defendant, by its repeated claim that the Interstate Commerce Commission *alone* had jurisdiction, expressly denied the jurisdiction of the federal court. So far as appears from the record defendant preferred to have the cause tried by the state court. A plea to the jurisdiction is not good unless it gives a better writ.

In *Texas & Pacific Railway Co. vs. Saunders*, 151 U. S., 105, 109, the defendant in an action brought in the Circuit Court of the United States for the Eastern District of Texas pleaded that the defendant, if liable at all, was liable only on intervention in a certain proceeding in the United States

Circuit Court for the Eastern District of Louisiana, and that it appeared that it was then too late to intervene in that proceeding. The court overruled that plea, and judgment being rendered against defendant the case was brought on writ of error to this court. The court, by Mr. Chief Justice Fuller, after stating the facts upon which the plea referred to was based, said:

"The plea was, therefore, not a plea to the jurisdiction, but a plea in bar. It did not seek to oust the jurisdiction of the Circuit Court for the Eastern District of Texas by reason of jurisdiction in the Circuit Court for the Eastern District of Louisiana or elsewhere, and so give the plaintiff a better writ, but to defeat his recovery altogether. We do not think this presented any question of jurisdiction, as such, which we could consider."

The state court did have jurisdiction of the subject-matter, even assuming that damages for a violation of the Act were sought (*Darnell vs. Illinois Central R. Co.*, *supra*), and the objection that the action was premature was waived, as we have seen. But this was a common-law action in which no damages for a violation of the act to regulate commerce were claimed, and for that reason the state court alone had jurisdiction.

(c) *Refusal to instruct as to duty of carrier to collect published rate.*—Defendant's requested instruction No. 4 to the effect that it would have been a violation of law for defendant to collect any rate other than that published in its tariffs, was not relevant to any issue in the case. It is wholly immaterial that plaintiff would have been subject to a penalty if it had charged less than the published rate, when it had wilfully and maliciously published that rate for the purpose of putting itself in a position in which no other rate could be collected. The claim that defendant in all that it did was merely seeking to protect its published tariff was not made by defendant's answer, and was wholly un-

founded as we have seen, since there was no attempt to conceal the fact that the purchasers of the ties expected to move them as company material to points in other states, and it was the duty of defendant to collect the rate which was applicable. If, as counsel for defendant claims, the instruction was requested in order to rebut the presumption of malice which might otherwise arise from some of defendant's acts the request for the instruction did not present a federal question, but merely a question of evidence relating to one of the ingredients of a common-law action, and this court may not consider such a question, although the question may incidentally involve the construction of a federal statute. *Kizer vs. Texarkana & Fort Smith Ry. Co.*, 179 U. S., 199; *Seaboard Air Line Railway vs. Padgett*, 236 U. S., 668.

(d) *Refusal of defendant to permit its cars to leave its line.*—The alleged error in instructing the jury that it could allow damages on account of defendant's refusal to permit its cars to go into the possession of another railroad company was not considered by the Court of Appeals of Kentucky, nor did the defendant in its petition for rehearing in that court refer to the question, although it did undertake to state its "federal question" (Rec., p. 243). It also affirmatively appears that the question was not pressed upon motion for new trial in the trial court (Rec., p. 49). When the instruction of which the matter now complained of was a part was given by the court there was only a formal exception, and no attempt was then made to raise a federal question by that exception. The defendant by its answer stated merely that there had been no *uniform* custom in the matter of delivering its loaded cars upon the tracks of connecting lines, and did not deny that it frequently did for others what it refused to do for plaintiff, but it did deny that it had imposed any restriction upon plaintiff which it had not imposed upon other shippers with respect to *similar shipments*. The only issue made, therefore, related to the

similarity of plaintiff's shipments to the shipments to which the privilege in question was granted, and that was a question of fact for the jury. There was no suggestion in the answer that to require defendant to permit its cars to leave its line would deprive defendant of any constitutional right. If that defense had been made the plaintiff might have been able to show such a reciprocal arrangement between the defendant and its connecting lines as to the exchange of cars as would have been a complete answer to the claim made by the requested instruction. Besides, as the item of expense resulting from the refusal of defendant to permit its cars to leave its tracks was only a minor element of damage, it may be that the plaintiff would have requested the court to omit the part of the instructions now complained of if it had known that the objection to the instruction would be made the basis of a federal question. Where a federal right claimed goes to the foundation of the action it may be immaterial that the federal question is not raised until after the trial, but when the right affects merely a minor element of damage which the plaintiff might be willing to eliminate if he knew that the claim would be tested by federal laws and not by State laws, then it becomes important that both the plaintiff and the trial court should know before the case is submitted to the jury that the right is claimed as a federal right. If that be not true, the defendant may conceal his claim of federal right until after the verdict for the express purpose of entrapping the plaintiff, and laying the foundation for setting aside the entire verdict because of a minor error which would not have been committed if the right in question had been asserted as a federal right before the case went to the jury. The Court of Appeals of Kentucky did not pass upon the objection in question, and we may assume that it did not do so because the assertion of the federal right came too late. *Cox vs. Texas*, 202 U. S., 446.

Assuming that to be the reason for the state court's refusal

to consider the alleged error, no federal question is presented. *Brown vs. Massachusetts*, 144 U. S., 573; *Louisville & Nashville R. R. Co. vs. Woodford*, *supra*.

The federal question, however, if properly raised is so lacking in merit as to be frivolous. The mere fact that a carrier is required to permit its cars to leave its line does not show that it is deprived of any constitutional right. *Michigan Central R. Co. vs. Michigan R. R. Commission*, 236 U. S. 615, 631.

The claim made for defendant is, in effect, that a carrier may wilfully and maliciously discriminate against one shipper in favor of another in the matter of permitting its cars to leave its line, even when it has refused to accept the cars of another company tendered for the shipment, and that the shipper injured by such discrimination is without remedy.

There are many things which a carrier may refuse to do, but which if it does for one shipper it must do for all.

Missouri Pac. Ry. vs. Larabee Mills, 211 U. S., 612, 619, was an application by a mill company to a court of the State of Kansas for a mandamus to compel the Missouri Pacific Railroad Company to switch cars from the point of its connection with the Santa Fe to the plaintiff's mill in the town of Stafford, Kansas, and the judgment of the state court granting the mandamus having been affirmed by the Supreme Court of the State this court, on writ of error to that court, in an opinion by Mr. Justice Brewer, said:

"The Missouri Pacific engaged in the business of transferring cars from the Santa Fe track to industries located at Stafford, and continued to do so for all parties except the mill company. So long as it engaged in such transfer it was bound to treat all industries at Stafford alike, and could not refuse to do for one that which it was doing for others. No legislative enactment, no special mandate from any commission, or other administrative board was necessary, for the duty arose from the fact that it was a common carrier. This lies at the foundation of the law of

common carriers. Whenever one engages in that business the obligation of equal service to all arises, and that obligation, irrespective of legislative action or special mandate, can be enforced by the courts."

Counsel for defendant says, however, that defendant did not permit its cars to go off its line for any shipper who was seeking to evade its interstate rates. But, as already said, the plaintiff paid the full rate for which it believed it was liable, and which the Court of Appeals of Kentucky subsequently said was the rate which applied to the traffic, and if it was liable for a higher rate it was the duty of defendant to collect that higher rate. The plaintiff cannot be charged with fraud in not paying a higher rate than the rate which the Court of Appeals of Kentucky found to be the rate applicable to its shipments, especially when the defendant acquiesced in that decision. Nor did defendant have the right, if the judgment of the state court was binding upon it, to defeat that judgment by imposing upon plaintiff annoying and expensive burdens and restrictions which it did not impose upon other shippers under substantially similar circumstances and conditions.

That ties shipped from other points in Kentucky to Louisville and there delivered to the Pennsylvania on its own tracks *as its own property* were intrastate shipments, although they were subsequently moved by that carrier *for its own use* to points in other States, seems clear, and the same is true of like shipments to the Big Four. If supplies sold in New York to defendant for delivery at Louisville, Ky., should be shipped to that point and there delivered to the purchaser, and the shipment should subsequently be moved by the purchasing carrier to some other point in Kentucky on its own line *for its own use*, the mere fact that the shipper in New York had reason to believe that such a movement by the purchaser *for its own use* would take place in Kentucky would not make that movement an interstate movement, and if that be true the movements here in question were not in-

terstate movements, so far as appears from this record. Waiving other differences, no case cited by counsel for appellant involved the movement by a carrier of its own material or supplies.

In *Rates on Railroad Fuel and Other Coal*, 36 I. C. C., 1, 8, upon authority of cases holding that the actual origin and destination of a shipment and not the billing determine whether the shipment is an interstate shipment or an intrastate shipment, the Commission held that a carrier could not select a particular point on its line as the fictitious destination of company material shipped to it from a point on another line and thereby procure a larger division of the through rate than it would be entitled to receive if the material had been billed to its real destination, but the Commission said:

"In so deciding we are not unmindful of the principle that a carrier may transport its own material free of charge over its own line. Therefore we must not be understood to hold that carriers may not, if they so desire, and by proper handling, take possession of the coal at the junction point and transport it free over their entire line. However, if this is done, the local rate as the lawfully published proportional rate up to the junction points must be paid. *This method has much to commend it not only for fuel coal, but for all so-called company material.*" (Italics ours.)

This means, of course, that the transportation under published tariffs ends with delivery to the carrier which owns the property, and the decision of the Commission in the case last cited, when so interpreted, is not inconsistent with anything which this court held or said in *Penna. R. R. Co. vs. Clark Brothers Coal Co.*, 238 U. S. 456, 468, on which counsel for defendant relies to show that the shipments in question were interstate shipments. But all the facts necessary to enable this court to determine whether the shipments in question were intrastate shipments or interstate shipments are not herè, as the record of the case in which the Court of

Appeals of Kentucky held that the shipments in question were intrastate shipments, although considered as read to the jury (Rec., p. 79), is not before this court, and even if that record were here this court could not in this case review that judgment of the Court of Appeals of Kentucky, especially as no federal question was raised as to that matter in the state court, and the assignment of errors does not present the question. Besides, it is immaterial whether the shipments for which defendant refused to furnish cars were intrastate or interstate shipments.

That it had been the universal custom of defendant prior to this controversy to deliver cars loaded with company material to the purchasing carrier and to permit that carrier to take the car forward without unloading was established by undisputed testimony (Rec., p. 107). Besides, defendant could not refuse to permit its own cars to leave its line when it had refused to accept the cars of the Pennsylvania tendered for that company's shipments. In any event, the alleged error could have affected only the item of \$771.56 awarded by the jury for expense of transferring ties.

II.

The failure of defendant to file a plea in abatement was an independent non-federal ground broad enough to support the failure of the Court of Appeals of Kentucky to reverse for alleged error in refusing to give defendant's requested instruction relating to rates.

The failure to file a plea in abatement which the Court of Appeals of Kentucky found to be sufficient to estop defendant from relying upon the order of reparation as a bar is an independent non-federal ground which is sufficient to justify the refusal of the trial court to give defendant's first requested instruction to the effect that the jury could not allow any damages to plaintiff on account of

defendant having charged to and collected from plaintiff unreasonable rates of freight for the carriage of interstate shipments of cross-ties.

The court held that as the proceeding before the Commission and this action were pending at the same time the defendant, if it intended to claim that both proceedings could not be maintained, should have filed a plea in abatement. This decision is based on a local question of pleading and practice not reviewable by this court, no attempt to avoid the federal question being apparent. *Vandalia Railroad vs. South Bend*, 207 U. S., 359; *Western Union Telegraph Co. vs. Wilson*, 213 U. S., 52; *Brinkmeier vs. Missouri Pacific Railway Co.*, 224 U. S., 268; *Louisville & Nashville Railroad vs. Woodford*, *supra*.

But even if the decision that the right claimed was waived by the failure to file a plea in abatement be reviewable it must be approved as being in line with the established practice both in Kentucky and other jurisdictions. *Louisville & Nashville R. R. Co. vs. Louisville Bridge Co.*, 116 Ky., 258, 268; *Gillen vs. Illinois Central R. R. Co.*, 137 Ky., 375; *New Orleans vs. Gaines*, 138 U. S., 595, 614; *Southern Pac. Co. vs. United States*, 186 Fed., 737, 742.

In *Louisville & Nashville R. R. Co. vs. Louisville Bridge Co.*, *supra*, where the court held that after defendant had acquiesced in the prosecution of two separate actions arising out of the same transaction it could not plead the judgment in the one of the two actions as a bar to the other, the court said (p. 268):

"If objection had been made to the separation of the cause of action, the plaintiff might have dismissed one suit without prejudice, and set up the entire cause of action in the other."

But counsel for defendant says it would have been impossible by a *plea in abatement* to make the objection which it did make in the trial court and in the Court of Appeals

and which it now makes. If the order of reparation was a condition precedent to the right of plaintiff to maintain this action of course it could not be a bar, and the claim made in the Court of Appeals that it was a bar implied that it was not a condition precedent. Defendant could not after claiming before the order of reparation was obtained that such an order was a condition precedent then claim after the order was obtained that it was a bar. If plaintiff had sought additional damages on account of the mere *charging* of the rates, it may be that defendant, if it had accepted the finding of the Commission that the rates were unreasonable, could have offered the order of reparation in evidence as an estoppel as to the amount of the damages suffered by plaintiff on that account, but not as a bar to any part of the action. The claim made in the Court of Appeals of Kentucky for the first time that the order of reparation was a bar to the action implied that if that order had not been obtained plaintiff might have recovered in this action, and defendant having abandoned its original contention that the assessment of damages by the Commission was a condition precedent to this action, it will not be heard to say that when it was making that contention there was no room for an election. If defendant is to be permitted to shift its position it cannot be in a more favorable position when it has done so than it would have been if it had originally taken the position which it took in the Court of Appeals of Kentucky. If it had originally taken the position which it took in that court there would have been no reason why it could not have pleaded in abatement so much of the proceeding before the Commission as sought reparation.

A claim that the order of reparation *estopped* plaintiff to claim any greater amount as damages resulting from the charging of the unreasonable rates than the amount awarded by the Commission would not have been inconsistent with the claim that no action in the courts would lie until the amount of the damages had been fixed by the Commission,

but the claim that the order of reparation without payment was a bar to this action was inconsistent with the claim that no action in the courts would lie until there had been such an assessment of damages by the Commission.

On page 52 of his brief on the merits, counsel for defendant says:

"If the shipper elects to go before the Commission and ask an award of damages from the Commission, he should be required to be satisfied if the award made in his favor is complied with."

This argument implies that plaintiff had a choice of remedies, and that if it had abandoned its right to recover the money maliciously taken from it by the defendant it would have had the right to maintain this action. That being the contention, there was room for a plea in abatement.

Not only was defendant estopped to plead the payment of the order of reparation as a bar, but it failed to rely in the trial court in any way upon the order of reparation or its payment.

In *Holtheide vs. Smith's Guardian, etc.*, 27 Ky. Law Rep., 60, 63, the Court of Appeals of Kentucky said:

"Ordinarily the defense of *res judicata* is required to be presented by plea, but it may be raised by demurrer when the pleading demurred to presents, as in this case, the facts showing the former adjudication."

In *Louisville & N. R. R. Co. vs. City of Louisville*, 141 Ky., 131, 134, the court said:

"The matter of *res adjudicata* can only be presented to the court by pleading."

In *United States vs. Bliss*, 172 U. S., 321, 326, upon appeal from the Court of Claims, the doctrine of *res judicata* was invoked to support the judgment appealed from, the former proceeding and judgment relied upon being intro-

duced into the record in this court by stipulation. The court said:

"If a party neither pleads nor proves what has been decided by a court of competent jurisdiction in some other case between himself and his antagonist, he cannot insist upon the benefit of *res judicata*, and this although such prior judgment may have been rendered by the same court."

That this court will either refuse to take jurisdiction or will affirm where there is an independent non-federal ground broad enough to support the judgment, is well settled.

In *Johnson vs. Risk*, 137 U. S., 300, where the defendants demurred upon two separate grounds, one of which involved the construction of an act of Congress and the other involved the bar of the statute of limitations of the State, and the Supreme Court of the State gave no opinion in affirming the judgment of the lower court sustaining the demurrer it was held that it could not be assumed that the judgment of the Supreme Court of the State was not based on the statute of limitations, that defense not being palpably unfounded, and that this was an independent non-federal ground broad enough to support the judgment.

In *Hammond vs. Johnston*, 142 U. S., 73, 78, the state court held that a sale under execution of land the legal title to which was in the United States passed to the purchaser an equity in the land which was owned by the execution defendant. The court also passed upon certain federal questions raised, saying that it did so in order that there might be no obstacle to a review of the judgment by this court. In dismissing the writ of error this court by Mr. Chief Justice Fuller said:

"It is well settled that where the Supreme Court of a State decides a federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a federal question and broad enough to maintain the judgment, the writ of error will be dismissed without considering the federal question."

In *Brown vs. Massachusetts*, *supra*, the court, by Mr. Justice Gray, held that the decision of the state court that objection to the jury which tried the plaintiff in error came too late after verdict was an independent non-federal ground upon which the judgment might be upheld regardless of the merits of the objection as a federal question, and that, therefore, this court had no jurisdiction. Many other cases are to the same effect.

III.

The defendant's first requested instruction was properly refused because there was no occasion for the caution or warning which the court was asked to give.

It does not appear that there was any evidence that could have authorized any damages on account of the mere charging of the rates as distinguished from the wilful and malicious maintaining of the rates other than the difference between the rates charged and the lumber rates, and that damage the jury was expressly instructed not to give.

No duty rested upon the court to give the instruction requested in the exact language in which it was offered, and as the court by instruction No. 5 gave the substance of defendant's requested instruction No. 1 the refusal of that requested instruction was not error.

The *normal* measure of damages for the *charging* of an unreasonable rate is the difference between the unreasonable rate and the rate which it is found would have been reasonable, and we do not believe any case can be found in which the Interstate Commerce Commission has ever given any other damages on account of the *charging* of an unreasonable rate, although it does now recognize that it must in a proper case give general damages (*Vulcan Coal and Mining Co. vs. I. C. R. R. Co.*, 33 I. C. C., 52). While the shipper is entitled to the *full damage* sustained, that means,

of course, the damages which are the *proximate* result of the wrong done.

In *Darnell-Taenzer Lumber Co. vs. Southern Pac. Co.*, 221 Fed., 890, 894, the Circuit Court of Appeals for the Sixth Circuit in an opinion by Circuit Judge Knappen, referring to the cases of *Penna. R. R. Co. vs. International Coal Mining Co.*, 230 U. S., 184, and *Meeker vs. Lehigh Valley R. R. Co.*, 236 U. S., 412, said:

"We find nothing in either the International Coal Co. Case or the Meeker Cases conflicting with the view that damages resulting from the imposition of unreasonably excessive rates are *normally* measured by the difference between the rate charged and a reasonable rate. Cases of excessive and unreasonable rates differ from discriminating charges in the fact that in the latter there is nothing unlawful in the charging and receiving of the higher or published rate on which the demand for reparation is based; the unlawfulness is in giving a lower rate to some one else. On the other hand, the charging of an excessive and unreasonable rate is *ipso facto* unlawful."

In *Baer Bros. vs. Denver & R. G. R. R.*, 233 U. S., 479, 488, this court assumed that "reparation" would be awarded as a matter of course on account of past unreasonable charges to the extent of the excess over reasonable charges. Referring to cases where what was an unreasonable rate in the past is found to be reasonable at the time of the hearing the court, by Mr. Justice Lamar, said:

"In such a case reparation would be awarded for past unreasonable charges collected but no new rate would be established for the future."

If the carrier after collecting the unreasonable rate wilfully and maliciously withholds from the shipper the excess over a reasonable rate with intent to injure his business, that wrong is quite distinct from the wrong done by the mere charging of the rate.

The Immigration Act of Congress of February 20, 1907, c. 1134, sec. 19, 34 Stat., 904, provides a penalty against the owner of any steamship who shall make any "charge" for the return of any alien brought to the United States and not entitled to enter, or who shall take any security from him for the payment of such charge, and in *United States vs. Nord Deutscher Lloyd*, 186 Fed., 391, 394, the United States Circuit Court for the Southern District of New York, construing that provision in an opinion by District Judge Hand, held that to retain money taken in a foreign country was not a continuous repetition of the taking within the United States. The court, referring to the word "charge," said:

"The word means some overt act by which the charging party manifests his purpose to demand the money charged from the party charged; it does not include the subsequent relations which are consequences of the act. In short, it is not a legal relation which continues wherever the two parties may come."

Where two shippers are charged the same unreasonable rate and the carrier at once joins with one of them in an informal request for permission to refund the excess over a reasonable rate, but maliciously refuses to join with the other in such a request, with intent to injure his business by tying up his capital, the injury to the latter shipper is entirely different in nature from the injury which the other shipper suffered, and cannot be said to have resulted from the *charging* of the rate, except to the extent of the excess over a reasonable rate.

So long as the defendant persisted in *maintaining* the unreasonable rates on cross-ties there could be no reparation except upon formal complaint, and we have seen that it required almost seven months to have a formal complaint heard and decided by the Commission. The general rule is that the Commission will not authorize a carrier upon informal complaint to make reparation to a shipper, without

requiring the reduced rate to be maintained for one year in the future, and where the carrier is unwilling to do that it becomes necessary for the shipper to file a formal complaint in order to obtain reparation.

In *Stone-Ordean-Wells Co. vs. C. B. & Q. R. Co.*, 16 I. C. C., 30, 31, the Commission said:

"These parties expressed the desire that the complaint be considered as informal in character, so that under the rules of the Commission relating to informal awards of reparation, the order establishing the rate for the future might be limited to a period of one year. Formal complaint was made necessary and formal hearing was required in this case by the attitude and action of defendants, and in accordance with the usual practice the defendants should maintain the rate prescribed as reasonable for a period of not less than two years."

The plaintiff in December, 1910, requested the defendant to issue new tariffs naming lumber rates on ties, and then to join with it in a request to the Commission for permission to refund freight charges already paid to the extent of the excess over the lumber rate, but this the defendant refused to do (Rec., p. 87). The tying up of plaintiff's capital resulted, therefore, from the *maintaining* of the rates and not from the *charging* of the rates.

The only damage which is allowed for the failure to comply with a contract to pay money is interest. *Insurance Co. vs. Piaggio*, 83 U. S., 378, 386; *Loudon vs. Shelby County Taxing District*, 104 U. S., 771, 774.

It would seem, therefore, that where a carrier in good faith publishes and collects a rate which it believes to be reasonable it ought not to be liable for any greater damage for withholding from the shipper in like good faith the excess over a reasonable rate until the Interstate Commerce Commission has found the rate to be unreasonable than it would be liable for it if it had failed to comply with a contract to pay the money to the shipper. It is only for *wilful* violations of the

Act to Regulate Commerce that carriers are subject to penalties (section 10). It is not claimed for defendant that there was any evidence before the jury of any damage resulting from the *charging* of the rates other than that which the jury was expressly instructed not to give, except that which resulted from the malicious withholding from plaintiff of money to the use of which it was entitled; and, besides, it does not appear that any damage would have resulted from that act alone. It follows, therefore, that the refusal to give the requested instruction was not error.

IV.

Neither the procurement by plaintiff of the order of reparation from the Interstate Commerce Commission nor the acceptance by plaintiff of payment of that order operated as a bar to this action.

A. It was the established rule of the Interstate Commerce Commission at the time the order of reparation was procured not to take jurisdiction of claims for such damages as were recovered in this action, and it cannot be assumed that the Commission decided the matters here involved.

In *Joyes vs. Penn. R. R. Co.*, 17 I. C. C., 361, the Interstate Commerce Commission held that it would not take jurisdiction of claims for damages other than for the difference between an unreasonable rate charged and the rate found by the Commission to be reasonable, which difference was termed "rate damages."

In *Charles Becker vs. P. M. R. R. Co.*, 28 I. C. C., 645, 657, decided December 8, 1913, after this case was tried, referring to two questions, the latter of which related to the complainant's right to "tort or general damages as distinguished from rate damages," the Commission said:

"Considering these questions in the reverse order, it is to be observed that as to the general damages the

defendant raises the question of the Commission's jurisdiction, and at the hearing made no showing regarding the damages, but reserved the right to apply for further hearings if the Commission should take jurisdiction. The question of jurisdiction we have discussed in *Joynes vs. Pa. R. R. Co.*, 17 I. C. C., 361, and more recently in *Hillsdale Coal & Coke Co. vs. P. R. R. Co.*, 23 I. C. C., 186. In the present case we shall do no more than to refer to our conclusions in these cases, since apart from the jurisdictional question we believe that here there should be no award of damages of this nature."

It cannot be said *with certainty* that the particular matter in controversy in the proceeding before the Commission was anything more than the right of plaintiff to recover of defendant the freight charges collected by defendant to the extent they exceeded what the charges would have been if the lumber rates had been applied, while the matter in dispute in this action was the amount of the damages which had resulted from the *malicious maintenance* of the unreasonable rates combined with various other malicious acts of defendant. The two causes of action, therefore, were not the same, and the order of reparation, if conclusive at all, was conclusive only as to matters which were in fact decided by the Commission, and not as to matters which might have been decided. *Russell vs. Place*, 94 U. S. 606; *Last Chance Min. Co. vs. Tyler Mining Co.*, 157 U. S. 683, 687; *De Sollar vs. Hanscome*, 158 U. S. 216, 221.

In determining what matters were in fact decided in the former proceeding resort must be had to the record in that proceeding, and the judgment will not operate as an estoppel unless the court can say *with certainty* that the former action or proceeding could not have been decided without deciding the exact matter in controversy in the pending action. In *Russell vs. Place*, *supra*, the court by Mr. Justice Field said (p. 610):

"According to Coke, an estoppel must 'be certain to every intent'; and if upon the face of the record any thing is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded and nothing conclusive in it when offered as evidence."

The record before the Commission is not here, and there can be no presumption that the Commission took jurisdiction of any claim for damages other than the claim for rate damages or that plaintiff did not specifically ask merely for the recovery of the amount wrongfully held by defendant. No obligation rested upon plaintiff to apply for a mandamus to compel the Commission to take jurisdiction of the claim for damages asserted in this action, even if the Commission could have been compelled to do so, but plaintiff was warranted in accepting the established rule of the Commission as the law and in going into the courts to recover such damages.

In *Borcherling vs. Ruckelshaus*, 49 N. J. Eq., 340, the court held that where a court of law refused to permit the defendant to rely upon an estoppel upon the ground that only a court of equity could consider that defense the defendant was warranted in accepting that ruling as the law of that case and in setting up the estoppel in a court of equity as ground for setting aside the judgment rendered against him in the court of law, although he might have prosecuted an appeal from that judgment and assigned as error the refusal to permit him to set up the estoppel.

In *Michels vs. Olmstead*, 157 U. S., 198, referring to the fact that a certain writing was not intended as a contract, the court, by Mr. Justice Gray, said (p. 201):

"It is suggested in the brief for the appellant that if such was the fact, it should be set up in an action at law, and be tried by a jury. But the conclusive answer to the suggestion is, that evidence of this very fact was offered in the action at law, and excluded, upon his objection, as incompetent in that action; and that he is thereby estopped now to assert that it could or should be availed of at law."

The principle of these cases applies here if defendant is right in supposing that this is an action to recover damages for a violation of the act to regulate commerce, since if any objection was made to the jurisdiction of the state court that objection was based on the ground that the Interstate Commerce Commission alone had jurisdiction.

The cases cited also show the reason for the rule requiring that the defendant who intends to rely on a judgment as a bar shall in some way give notice of that fact, since otherwise the plaintiff would have no opportunity to plead an estoppel.

B. The Interstate Commerce Commission did not have jurisdiction of the claim for damages asserted in this action, and plaintiff, by going to the Commission for reparation, did not abandon its right to such damages.

This was not an action to recover damages for a violation of the act to regulate commerce, but a common-law action against a common carrier to recover damages for wilful and malicious injury to a shipper's business. The mere fact that one of the instruments maliciously used by the carrier was an abuse of a right or privilege given to the carrier by that act is immaterial. The action was in the nature of an action for an assault on plaintiff's business, and the character of the instruments used does not affect the nature of the action. The blows and the resulting injury created the right of action. As there were at least some of the acts complained of on account of which the Commission would have had no jurisdiction to give damages, it had no jurisdiction to give damages for the injury resulting from the combination of acts. The wilful refusal of the carrier to furnish cars or to accept cars of other carriers for plaintiff's shipments was a breach of a common-law duty of which the Commission had no jurisdiction, especially when that refusal applied to intrastate shipments and interstate shipments alike. *Louisville & Nashville R. R. Co. vs. Cook Brewing Co.*, 223 U. S. 70; *Pennsylvania Railroad Co. vs. Puritan Coal Mining Co.*,

237 U. S., 121; *Illinois Central R. R. Co. vs. Mulbery Hill Coal Co.*, 238 U. S. 275.

It would have been impossible to separate the damage which resulted from the wilful and malicious publication and maintenance of unreasonable rates from that which resulted from the wilful and malicious refusal to furnish cars, as both resulted in preventing plaintiff from making shipments and also in tying up plaintiff's capital and thus injuring its credit, and it could not be said that either alone would have caused those injuries. Besides, the plaintiff was entitled to have a jury pass upon the matter of exemplary damages, it not being within the province of the Commission to give such damages. *Eichenberg vs. Southern Pacific Co.*, 28 I. C. C., 584, 588.

In answer to this argument counsel for defendant relies upon *Penna. R. R. Co. vs. Clark Brothers Coal Co.*, 238 U. S., 456, 472, where it was held that the plaintiff, after going to the Interstate Commerce Commission and procuring an order condemning as unjustly discriminatory the distribution of cars by the carrier and an award of damages on account of such discrimination, could not then go into a state court and recover treble damages under a state statute.

In that case the carrier did not hold money maliciously taken from the shipper, and which the shipper could not recover in the state court without first going to the Commission. Besides the damages recovered in the state court in that case were given on account of the same acts for which the Interstate Commerce Commission awarded damages, while in the instant case plaintiff sought damages in the state court on account of acts for which the Commission had not awarded, and had no jurisdiction to award, damages.

The wilful and malicious withholding from plaintiff of the excess over the lumber rates after that money was collected was not a violation of the statute, but even if it was the plaintiff did not recover any damages resulting from that act alone. Besides, no federal question was predicated

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upon that act. The injury to credit and to business resulted from a combination of malicious acts, of which the Commission would have had no jurisdiction, while the counsel fees resulted from the wilful and malicious refusal of defendant to cancel its unreasonable rates, making it necessary for plaintiff to employ counsel to have those rates condemned. It was alleged in the petition that when defendant published its extortionate rates on cross-ties it contemplated that plaintiff would have to pay counsel fees to obtain reparation, and intended to inflict that injury on plaintiff (Rec., p. 10), and it was not denied that defendant contemplated that plaintiff would have to pay reasonable counsel fees to obtain reparation, the denial being merely that it intended "to impose upon plaintiff the burden of paying such attorneys' fees" (Rec., p. 41). But the matter of counsel fees is not now before this court, as defendant has raised no federal question as to that item of damage. Of course, plaintiff's right to recover counsel fees was asserted as a common-law right on the ground that this was a damage foreseen and intended.

As this action, therefore, is not an action to recover damages for a violation of the act, it is not controlled by the case of *Penna. R. R. Co. vs. Clark Brothers Coal Co.*, *supra*.

The order of reparation merely fixed with precision the extent to which the freight charges were unreasonable and the extent to which defendant was authorized to make payment. If we had not gone to the Commission for reparation we would have been compelled to go to a federal court for that relief or abandon our right to reparation, and neither the Commission nor the federal court could have given the damages recovered in this action. If the argument of counsel for defendant be sound a shipper who has been charged an unreasonable rate which was maliciously published with intent to destroy his business and has suffered damage from that malicious publication of the rate in connection with other malicious acts of the carrier must abandon either his right to

recover the excess over a reasonable rate which is wrongfully held by the carrier or his common-law right to recover damages for the injury to his business which has resulted from the malicious publication of the rate in connection with the other malicious acts of the carrier. But the two rights are in no way inconsistent, and section 22 of the act, which provides that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies," clearly preserves to plaintiff both rights.

It would be an anomaly if a shipper from whom a carrier has collected an unreasonable rate which was maliciously published with intent to injure the shipper's business could have no remedy for the injury to his business resulting from that act in connection with other malicious acts without abandoning his right to recover the money maliciously taken from him by the carrier.

C. The malicious maintenance of rates which the carrier knows to be unreasonable with intent to injure a competitor's business gives a common-law right of action.

The courts of the country differ as to whether or not an act otherwise not actionable may give a right of action because it was done with bad intent, but the question presented in the trial court in the instant case was whether or not unlawful acts gave a right of action for the recovery of damages which were foreseen and intended and could not otherwise have been recovered, and that question the courts seem to uniformly answer in the affirmative.

A tariff is in the nature of process provided by law for the collection of a carrier's rates, and when a railroad for the purpose of injuring the business of a competitor abuses the privilege which the law gives it of issuing a tariff and collecting whatever rate it may publish, however unreasonable that rate may be, it commits a wrong akin to that which is committed by one who maliciously procures an attachment

for the purpose of injuring the business of another, maliciously prosecutes an action for that purpose, and to all such wrongs give a common-law right of action is well settled.

In *Woods vs. Finnell*, 76 Ky. (13 Bush), 628, 633, the court said:

"In cases where the plaintiff has mistaken his position, or has been non-suited, or where, by reason of some imaginary claim, he has seen proper to sue the defendant, it is not pretended that any action for damages can be maintained; but where the claim is not only false, but the action is prompted alone by malice and without any probable cause, the defendant's right of recovery, for the expenses incurred and damages sustained, should be as fully recognized as if his property had been attached or his body taken in charge of by the sheriff.

"While the damages may be less in the one case than the other, the legal right exists and some remedy should be afforded. If the facts alleged in these positions are true, and they must be so treated on a writ of *habeas corpus*, it would be a singular system of jurisprudence that would admit the wrong and still withhold a remedy."

The court in that case allowed counsel fees as a part of the damages which resulted from the malicious act of the defendant in the prosecution of the action which he knew to be unfounded.

In *Lawrence vs. Hagerman*, 56 Ill., 68, 76, the court said:

"It is insisted that an action on the case for maliciously suing out a writ of attachment cannot be maintained. The objection proceeds on the ground that, inasmuch as the statute requires the plaintiff in attachment to give bond, with security, conditioned to pay all damages in case the writ is wrongfully issued, before obtaining the process, the remedy is confined to an action on the bond. We think the objection taken is not tenable, certainly not to the extent insisted upon by the counsel. The remedy

by an action on the case and upon the bond may be concurrent to a certain extent. Actual damages, such as direct loss on the property attached, expenses incurred in defense of the suit, may be recovered in an action on the bond. But for loss of credit, breaking up of business, loss of customers and injury to reputation, resort must be had, to obtain full indemnity, to an action on the case for malicious prosecution, under the common law."

In *Dunshee vs. Standard Oil Co.*, 152 Iowa, 618, 626, after stating that the defendant, Standard Oil Co., had the right to compete for business with plaintiff, the assignor of the Crystal Company, the court said:

"If, however, there was no real purpose or desire to establish a competing business, but under the guise or pretense of competition, to accomplish a malicious purpose to ruin the Crystal Company or drive it out of business, intending themselves to retire therefrom when their end had been secured, then they can claim no immunity under the rules of law which recognize and protect competition between dealers in the same line of business seeking in good faith the patronage of the same people."

In *Tuttle vs. Buck*, 107 Minn., 145, it was held that the establishment of a barber shop for the malicious purpose of destroying plaintiff's business as a barber was actionable.

In *Southern Railway Company vs. Chambers*, 126 Ga., 404, the court held that malicious injury to plaintiff's business as a licensed drayman gave a right of action.

In *Schonwald vs. Ragains*, 32 Okla., 223 (39 L. R. A., N. S., 854) it was held that unfair competition whereby the business of plaintiff was injured gave a right of action.

In *Aikens vs. Wisconsin*, 195 U. S., 194, which involved the constitutionality of a statute of Wisconsin imposing imprisonment or fine on "any two or more persons who shall combine for the purpose of wilfully or maliciously injuring another in his reputation, trade, business or profession by

any means whatever," the court, by Mr. Justice Holmes, after citing cases to the effect that the justification of an act may depend upon the end for which the act was done, said (p. 204):

"It is no sufficient answer to this line of thought that motives are not actionable and that the standard of the law are external. That is true in determining what a man is bound to foresee, but not necessarily in determining the extent to which he can justify harm which he has foreseen."

Again the court said (p. 206):

"No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law."

But counsel for defendant says that the fact that defendant may have maliciously refused to cancel its extortionate rates is beside the question, because the plaintiff might have gone to the Interstate Commerce Commission sooner than it did, and procured from the Commission an order requiring defendant to reduce its rates on cross-ties. The fact is that plaintiff made repeated requests of defendant to give cross-ties the same rates as lumber and defendant refused those requests (Rec., pp. 84, 87, 88). It is also true that plaintiff filed its complaint with the Commission September 15, 1911, and did not get relief until seven months later, during which time it suffered much of the damage of which it here complains. The argument is that although defendant maliciously refused to cancel rates which it knew to be unreasonable, and which it might have canceled at any time, yet that as plaintiff was guilty of laches in not proceeding sooner to compel defendant to do that which it knew it ought to do, and which for the malicious purpose of injuring plain-

tiff's business it had refused to do, even after plaintiff had filed its complaint, the defendant is not liable.

Plaintiff knew that it *might* require several months to procure an order from the Interstate Commerce Commission condemning the rates complained of, and it was not until defendant gave unmistakable evidence of its malice in the summer of 1911 that plaintiff ceased to hope that it would heed the repeated warnings that had been given by the Interstate Commerce Commission. The defense of contributory negligence was not made by the answer, and plaintiff was given no opportunity to meet that issue. If, however, plaintiff could be regarded as negligent in failing sooner to file a complaint before the Commission, it is well settled that one who has wilfully injured another cannot complain that the injured person did not exercise ordinary care to avoid the consequences of the injury.

In *Shannon vs. McNabb*, 29 Okla., 829, 834, where plaintiff sued to recover damages for injury to his crop of cotton, resulting from the wrongful act of defendant in driving cattle into his field the court said:

"The continuing character of the wrong which was knowingly perpetrated upon plaintiff, taken in conjunction with the wilfulness of its perpetration, and considering that it was such as the law denounced as a crime, in our judgment relieved plaintiff of any duty to minimize the damages which defendants were inflicting, but entitled him to stand on his rights and hold the tort-feasors to full accountability, and this rule is especially applicable where a trespasser profits by his tort."

Judge Gordon, of the trial court, in his opinion overruling the motion for new trial found that the defendant in this case had profited by its malicious acts (Rec., p. 52).

In *Niagara Oil Co. vs. Ogle*, 177 Ind., 292, 301, the court, by Chief Justice Morris, held that the plaintiff owed no duty to take steps to reduce the damage to his land and crops from a nuisance maintained by defendant.

In *Galveston, Harrisburg & San Antonio Ry. Co. vs. Zantinger*, 92 Texas, 365, 371, the court, by Chief Justice Gaines, held that the plaintiff owed defendant no duty to use ordinary care to avoid the consequences of personal injuries inflicted by defendant's wilful act. The court said:

"Since one who has committed an assault and battery upon another cannot urge in his defense that the plaintiff might by the use of due care have avoided the battery, we think where the injury is intentional he should not be permitted to say, in reduction of the damages, that the plaintiff might have prevented them, at least in part, by careful conduct on his part."

D. Injury to business resulting from a series of malicious acts gives a right of action separate and distinct from that which exists for the injury done by any one of those acts.

In *Boyce vs. Odell Commission Co.*, 107 Fed., 58, the United States Circuit Court for the District of Indiana, in an opinion by District Judge Baker in an action to recover money alleged to have been lost in gambling on options, said:

"A series of wrongful acts all aiming at a single result and contributing to the injury complained of, to wit, the destruction of one's business credit, and reputation may be counted on collectively as producing that result in an action on the case." Citing *Oliver vs. Perkins*, 92 Mich., 304.

In *Fagg's Admr. vs. L. & N. R. R. Co.*, 111 Ky., 30, the court held that separate and distinct acts of negligence which were alleged to have caused the death of plaintiff's intestate should have been included in a single paragraph of the petition, and that it was not necessary or proper to divide the petition into two paragraphs.

The case at bar does not differ in principle from that case. Here various malicious acts of the defendant contributed, and were intended to contribute, to the injury of plaintiff's

business just as the various acts of negligence complained of in the Fagg case contributed to the death of plaintiff's intestate, and just as it was impossible in that case to determine how far each act of negligence contributed to the death, so it is impossible in this case to determine just how far each of the malicious acts complained of contributed to the injury of plaintiff's business.

In *Standard Oil Co. vs. Doyle*, 118 Ky., 662, it was held that plaintiff was entitled to recover damages for injury to his business resulting from a series of wanton and malicious acts committed by defendant for the purpose of inflicting the injury complained of.

In *Julian, etc., vs. Pilcher*, 2 Duvall, 254, the court held that an action to enforce a lien to secure a note was not for the same cause as an action at law to recover a personal judgment on the note. The court said:

"The note, it is true, furnishes a necessary part of the ground or cause of action in each case. But, in one case, the note and its non-payment, when due, made up the whole cause of action, while in the other, the existence and validity of a lien are additional facts, essential to the cause and maintenance of the action."

To the same effect is the case of *Black vs. Lackey*, 2 B. M. 257.

As said by the Circuit Court of Appeals for the Eighth Circuit in *Harrison vs. Remington*, 140 Fed. 385:

"The test of the identity of causes of action is the identity of the facts essential to maintain them."

By the first motion which defendant made in the trial court it asked the court to require the plaintiff to paragraph its petition and to state as a separate cause of action each of the wilful and malicious acts alleged in the petition and the injury resulting therefrom. The trial court overruled the motion upon the ground that the various wilful and

malicious acts alleged, with the injury to business and property resulting therefrom, constituted jointly a single cause of action, which was not severable (Rec., pp. 13-14). That action of the trial court was not relied upon as error in the Court of Appeals of Kentucky, and is not assigned as error here, although the Court of Appeals did hold that the various wilful and malicious acts alleged jointly constituted a single cause of action.

An important element of damage was the injury to plaintiff's credit which resulted from the persistent effort of defendant to destroy its business, and the existence of that element of damage illustrates the futility of attempting to apportion to each of defendant's malicious acts the injury which resulted from that act. It appears that one loan of \$40,000 was withdrawn from plaintiff because of the assault by defendant upon its business (Rec., p. 116), and it would be impossible to say that any one of defendant's malicious acts alone would have caused that injury.

E. It does not follow that the causes of action in two cases are the same because they originate in the same transaction or series of transactions.

In *Walker vs. Mitchell*, 18 B. M., 541, the Court of Appeals of Kentucky held that the plaintiff, who had in an action to recover land elected to sue also for damages for the detention of the land, was precluded by the judgment in that case from subsequently recovering damages of any kind for the detention of the land, which might have been recovered under the allegations of her pleading in that case, but the court said:

"But in this case the plaintiff claimed in her petition a right to recover for the extraordinary expenses incurred in her action for the recovery of the land, and as these expenses could not well have been recovered in that action, and were not set up or embraced in the petition in terms, or by any fair or

reasonable construction, she could not, as to those expenses, have been barred by the former recovery; it results, therefore, that the court below erred in giving judgment in bar of the claim to recover the reasonable fees she had paid, or was bound to pay to counsel for services in and about the recovery of the land; but as to all else besides this claim the judgment was correct."

Such extraordinary expenses were recoverable in this action not only for reasons similar to those there given, but also because it was necessary to prove in order to authorize their recovery that the defendant acted in bad faith in maintaining the unreasonable rates. In that view of the case *Bramlette vs. L. & N. R. Co.*, 113 Ky., 300, and another case of the same style, 24 Ky. Law Rep., 976, are in point. In those cases the court held that the pendency of an action to recover damages for the negligent operation of live-stock pens or a judgment for such damages was not a bar to an action to recover damages for the injury which would have resulted even if the stockpens had been prudently and carefully operated. It seems that in those cases the operation was always negligent, and yet the plaintiff was permitted to recover in one action the damages which would have resulted if the operation had been prudent, and in the other the additional damages which resulted by reason of the negligence. The court treated one action as in the nature of an action to recover the value of property taken, and the other as an action to recover damages for a tort, thus introducing a new element.

The case of *Crockett vs. Miller*, 112 Fed., 729, decided by the United States Circuit Court of Appeals for the Eighth Circuit, illustrates the distinction between the recovery of damages which flow proximately from the violation of the statute and the consequential damages resulting from a wilful and malicious abuse of the process given to the carrier by the statute for the collection of its rates and arising

out of facts specially pleaded. The case cited was an action against a sheriff to recover damages for wilfully and maliciously levying an execution upon plaintiff's property with intent to destroy her business credit and standing. The court held that the action was analogous to one for the malicious abuse of civil process, and that a recovery by plaintiff of the property wrongfully seized, together with the damages resulting from the unlawful detention of the property, was not a bar to an action for extraordinary damages arising out of facts specially pleaded. The court, in an opinion by Judge Adams, said (pp. 735-736):

"As a result of a careful examination of many cases, not only those to which our attention is called by defendants' counsel, but many others to which we have given critical attention, we think the rule may be safely stated as follows: That the only damages which can be recovered by plaintiff in an action of replevin under the statutes of Nebraska as construed by the Supreme Court of that State, where the property has been delivered to the plaintiff, are interest on the value of the property during the time plaintiff is deprived of its possession, the injury or damage done thereto by the officer in taking the same and while in possession thereof, and, in some cases, the usable value or the value of the use of the property while so detained. This we believe to be the New York doctrine, and is substantially the doctrine of the State of Nebraska, as we understand the decisions.

"Accordingly it follows that the collateral or consequential damages occasioned by a seizure of property by the officer against whom the replevin suit is brought, such as injury to the business reputation, credit and standing of the plaintiff occasioned by the malicious conduct of the officer making the seizure, coupled with the express purpose and intention of so injuring the plaintiff, are not within the purview of the statutory damages flowing from the unlawful detention of property, within the meaning of replevin acts. They are totally different from them, in that they do not flow proximately from the

act of detention merely, but are special and consequential damages, arising out of facts specially pleaded in this case showing an intention to inflict them.

"It is more obvious that the other element of damages, namely, the attorney's fees and expenses of the plaintiff in asserting her claim and defending her title to the property seized by the sheriff could not have been introduced into the replevin suit. It was for services rendered and expenses incurred in that suit that the plaintiff was damaged, and, in the absence of some statutory provision permitting recovery therefor in the suit itself, it is obvious that if the necessary prerequisite element of malice existed she was required to institute another and different suit therefor. The trial court limited plaintiff's right of recovery in this action to such damages as she might have sustained by reason of loss of business credit and by reason of expenses incurred in the prosecution of the replevin suit, carefully withdrawing from the jury any consideration of damages occasioned by reason of the detention itself of the property. There was no exception taken to the court's direction with respect to damages. In other words, it was conceded at the trial that, if plaintiff was entitled to recover at all, she was entitled to recover the two items last alluded to. For the foregoing reasons, the defendants' contention that the claim asserted in this action is *res adjudicata* cannot prevail.

"For like reasons, also, there is, in our opinion, no merit in the theory of estoppel, by splitting the cause of action, as argued by defendants' counsel. If the damages resulting to plaintiff's business standing and credit, as a consequence of the malicious conduct of the sheriff, could not have been recovered in the replevin suit, surely the plaintiff should not be punished for not attempting to do so."

In *Talcott vs. Friend*, 179 Fed., 676, the Circuit Court of Appeals for the Seventh Circuit, in an opinion by Circuit Judge Baker, held that one who proved a claim in bankruptcy for the price of goods sold to the bankrupt was not precluded from bringing an action for deceit based on false

representations made by the bankrupt upon the faith of which credit was given.

In *Glaspie vs. Keator*, 56 Fed., 203, the Circuit Court of Appeals, Eighth Circuit, in an opinion by District Judge Thayer, held that the satisfaction of a judgment against plaintiff's agent for the amount he had received as a secret profit from one from whom plaintiff had purchased land, relying upon the agent's false representations as to the value of the land did not operate as a satisfaction of a judgment in plaintiff's favor against the same agent for damages on account of the deceit.

In *Hansen vs. Taylor*, 108 Ga., 567, it was held that a judgment in plaintiff's favor for the amount he had paid to defendant as a part of the purchase price of property which defendant had subsequently taken from him by force was not a bar to an action by plaintiff to recover damages growing out of the unlawful seizure of the property.

In *Weeks vs. Edwards*, 176 Mass., 453, plaintiff sought partition of land, claiming one-fifth by descent. He then filed suit to establish a resulting trust, claiming that he had paid a part of the purchase price of the land and claiming an additional interest on that account. The former action, which was still pending, was pleaded in abatement. The court, in an opinion by Chief Justice Holmes, now Mr. Justice Holmes of this court, held that the actions were not inconsistent. The court said:

"The plaintiff has a legal title to one-fifth. It is consistent with this that he should have an equitable right to a larger share."

F. The demand was not an indivisible one, and that part of the demand here sued on had not accrued when the claim was filed before the Commission.

In its opinion in this case the Court of Appeals, referring to the action in the state court for a mandatory injunction, said (Rec., p. 221):

"As above stated the action in the state court was in equity, and to secure extraordinary relief in the way of shipping facilities and to recover special damages. At that time appellant's malignant purpose was not apparent, and the greater damage in the way of a destroyed business had not been sustained. The same is true of the complaint filed with the Interstate Commerce Commission for damages due to violation of that statute."

We have a finding, therefore, by the state court that the damages awarded in this case had not accrued at the time the complaint before the Interstate Commerce Commission was filed, and this finding of fact is not assigned as error. But even if it were assigned as error it would have to be accepted as correct, no attempt to avoid the federal question being apparent.

In *Telluride Power Co. vs. Rio Grande, etc., Ry.*, 175 U. S., 639, where rights to the use of water for mining purposes under a federal statute depended upon "priority of possession," it was held, in an opinion by Mr. Justice Brown, that the question of fact decided by the state court as to which party had priority of possession was not a federal question, but was merely preliminary to, or the possible basis of, such a question, and that, therefore, the writ of error must be dismissed. Many other cases are to the same effect. *Henderson Bridge Co. vs. City of Henderson*, 141 U. S., 679; *Telluride Power Co. vs. Rio Grande Western Ry. Co.*, 187 U. S., 569.

It being established, therefore, that the damages here sought to be recovered had not been sustained when the complaint before the Commission was filed the payment of the order of reparation is not a bar to this action.

Cross vs. United States, 14 Wall., 479, 484, was a proceeding by Cross as assignee of a lease to recover rent alleged to have been due from the United States, and the Court of Claims having denied relief because the assignment of the lease was defective Congress passed an act waiving that de-

fect, whereupon the case was reheard and the relief granted. Thereafter Cross filed a petition to recover a subsequent installment of rent under the same lease, and the former recovery being pleaded in bar the court said:

"It is true the lease was at an end when Congress acted and the court reheard the cause, and Cross could by proper amendment to his petition have embraced also that portion of his demand for which he now sues; and that would have been the proper course for him to have pursued, but he was not compelled to take it. In covenant for non-payment of rent, payable at different times, a new action lies as often as the respective sums become due and payable. As this suit is for instalments of rent not due when the first suit was instituted, and as they were not included in it in any stage of the proceeding, the plea of former recovery has no application."

The same principle applies to torts. In *Esty vs. Baker*, 48 Me., 495, it was held that the continuance of a building on another person's land, even after the recovery of damages for its erection, was a trespass, for which an action would lie.

In *Leland vs. Marsh*, 16 Mass., 389, 391, the court held that every continuation of a false imprisonment is a new trespass.

The same principle was applied in *Oliver vs. Illinois Central R. Co.*, 25 Ky. Law Rep., 235.

It may be said that, having gone to the Commission for a part of our damages, we should have gone to the Commission for additional damages, but counsel for defendant insists that he did not raise that question. If he did attempt to raise the question, however, he did so only by his first requested instruction, and he was then too late. The objection, if made, was to the effect that the action was premature, and it is well settled in Kentucky, as we have seen, that the defendant by failing to file a demurrer to the petition waives that objection. As the question, if raised, was not decided by the Court of Appeals it must be presumed that the

court ignored the question for the reason that under the established practice in Kentucky the objection was waived.

CONCLUSION.

We have discussed the liability of defendant for damages resulting from the malicious maintenance of rates with intent to prevent plaintiff's shipments from moving, and with intent to injure plaintiff's business, as if that question were now presented by the record, but as defendant raised no federal question by its exception to the instructions given by the court to the extent that they related to that liability, and the approval of that part of those instructions by the Court of Appeals of Kentucky is not assigned as error, that question is not before the court.

As stated in the beginning, the two principal grounds upon which defendant asks a reversal are: (1) That the *payment* of the order of reparation is a bar to this action; (2) that the state court had no jurisdiction of this action.

Neither of these questions was presented to or considered by the trial court, and neither question was decided by the Court of Appeals. The other grounds upon which defendant relies for reversal, as we have shown, are wholly without merit. We ask, therefore, that the writ of error be dismissed or the judgment affirmed.

Respectfully submitted,

JOHN BRYCE BASKIN,
EDWARD W. HINES,
J. V. NORMAN,
For the Defendant in Error.

Office Supreme Court, U. S.

FILED

APR 12 1915

JAMES D. MAHER

CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915 1916

No. 66

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

OHIO VALLEY TIE COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.

MOTION TO DISMISS WRIT OF ERROR OR TO AFFIRM
OR TO TRANSFER TO THE SUMMARY DOCKET, AND
BRIEF IN SUPPORT OF MOTIONS.

JOHN BRYCE BASKIN,
EDWARD W. HINES,
J. V. NORMAN,
Counsel for Defendant in Error.



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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 824.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

OHIO VALLEY TIE COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.

**MOTION TO DISMISS WRIT OF ERROR OR TO AFFIRM
OR TO TRANSFER TO THE SUMMARY DOCKET.**

Now comes the defendant in error, Ohio Valley Tie Company, by its attorneys of record herein, and moves this honorable court:

First. To dismiss the writ of error herein, on the ground that this court has no jurisdiction thereof, no Federal question being involved therein.

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Second. To affirm the judgment of the Court of Appeals of Kentucky, on the ground that it is manifest that this writ of error was taken for delay only, and that the questions upon which the decision in this cause depends are so frivolous as to need little or no argument.

Third. To transfer this cause for hearing to the summary docket, if this court should refuse to dismiss or to affirm, because the cause is of such a character as not to justify extended argument.

JOHN BRYCE BASKIN,
EDWARD W. HINES,
J. V. NORMAN,

*All of Louisville, Ky.,
Attorneys of Record for Defendant in Error.*

**BRIEF FOR DEFENDANT IN ERROR IN SUPPORT OF
MOTIONS.**

Statement of the Case.

This is a writ of error to the Court of Appeals of Kentucky to review a judgment of that court affirming a judgment of the Jefferson Circuit Court at Louisville, Ky., for \$56,971.56, based upon a verdict of a jury for that amount. The action was brought by the Ohio Valley Tie Company, the defendant in error, against the Louisville & Nashville Railroad Company, the plaintiff in error, to recover damages for injury to the plaintiff's business, which was that of buying, selling, and shipping railroad cross-ties. For convenience the defendant in error will be referred to throughout this brief as the plaintiff and the plaintiff in error as the defendant. The plaintiff alleged that the damages claimed resulted from a combination of acts committed willfully and maliciously for the purpose of injuring the plaintiff's business and driving plaintiff from the market as a buyer of cross-ties in competition with defendant. The jury stated in its verdict that it awarded \$50,000 on account of injury to business, \$5,000 for injury to cross-ties, and the remainder for expenses incurred by reason of the wrongful acts.

The jury was permitted by the trial court to consider, in arriving at their verdict, four acts of the defendant, committed willfully and maliciously and with the intent to injure plaintiff's business and to prevent it from buying ties along the line of defendant's right of way, to wit:

1. Maintaining excessive and unreasonable rates condemned by an order of the Interstate Commerce Commission on April 8, 1912, pursuant to complaint by the plaintiff.

2. Failing and refusing to furnish cars requested by plaintiff for shipment of its ties, when it might, by the exercise of proper diligence, have so furnished cars for said shipments without interference with the rights of others.

3. Discriminating against the plaintiff by refusing to accept the cars of another carrier which plaintiff tendered for shipment of its ties when the defendant's own cars were not available, and when defendant was accustomed to accept the cars of other carriers when tendered by other shippers under substantially similar circumstances and conditions.

4. Discriminating against the plaintiff by requiring it to transfer and unload cars arriving over defendant's line at Louisville and refusing to allow such cars to go forward on connecting lines, while permitting the shipments of other persons to go forward in its cars on connecting lines under substantially similar circumstances and conditions.

Of these acts the first relates solely to interstate shipments and the others to both interstate and intrastate shipments.

The rates referred to were proportional rates applicable only to shipments to Louisville for points beyond in other States. The Railroad Commission of Kentucky, by a general order made so far back as the year 1905, had prohibited the railroads from charging higher rates on intrastate shipments of cross-ties than they charged on such shipments of lumber, and the Interstate Commerce Commission, beginning almost with its organization, had repeatedly held that rates on ties ought not to exceed the rates on the kinds of lumber from which they were made (Record, p. 90). The defendant, although it knew from experience that it would be compelled in the end to pay back to the plaintiff in each case the excess over the lumber rate, continued to publish rates on ties which greatly exceeded the lumber rates, and this it did, as the jury found, for the willful and malicious

purpose of tying up the plaintiff's capital and injuring its business, the carrier having almost \$20,000 of the plaintiff's capital tied up in that way at one time. At the time this action was instituted there was pending before the Interstate Commerce Commission a complaint by which the plaintiff attacked the proportional rates on cross-ties from points in Kentucky and Tennessee to Louisville "for beyond" and sought reparation in the sum of \$6,198 on account of extortionate charges collected in the past on 91 carloads of ties to which those rates applied. Pending this action the Interstate Commerce Commission found the rates complained of to be unreasonable to the extent they exceeded the lumber rates and awarded reparation. The plaintiff then filed an amended petition setting up the fact that the Interstate Commerce Commission had condemned the rates so found to be unreasonable, and alleging that those were the rates referred to in the petition. The defendant filed a special demurrer to two parts of the original petition: (1) to so much of the petition as complained of the alleged excessive charges on 89 cars of cross-ties, because it appeared from the petition that another action was pending in the same court between plaintiff and defendant, seeking to recover for the same alleged wrong, and (2) also to so much of the petition as complained of defendant's alleged wrong in charging unreasonable rates on interstate shipments of cross-ties because under the act of Congress entitled "An Act to Regulate Commerce," approved February 4, 1887, and its various amendments, the only tribunal having any power or right to give redress for such alleged wrongs is the Interstate Commerce Commission. The rates on the 89 cars of ties involved in the other action in the State court, the pendency of which was pleaded in abatement, were finally excluded from the consideration of the jury (Rec., p. 61), and need not be considered here.

The carrier pleaded in abatement the pendency of the other action in the State court, but it did not plead in abate-

ment the pendency of the proceeding before the Interstate Commerce Commission. The defendant insisted, however, in the Court of Appeals of Kentucky that it was the duty of plaintiff to elect whether it would go to the Interstate Commerce Commission for its damages or would go to the courts, and that having elected to go to the Commission for damages it was compelled to claim all its damages before the Commission. To this contention the court made answer as follows:

"We do not believe this position is tenable for three reasons: (1) This objection should come by way of a plea in abatement; and (2) the Interstate Commerce Commission as to damages is not a court, but its finding in that regard is evidential merely—neither binding nor conclusive; and (3) the instructions of the court prevent an allowance of anything for excess freight or any damage by reason of the act of charging excess fares."

Not only did the defendant fail to ask either by a plea in abatement or by a motion to that effect that plaintiff be required to elect whether it would prosecute its claim for reparation before the Interstate Commerce Commission or its claim for extraordinary or general damages in this action, but the special demurrer which it filed clearly negated any intention to ask that such an election be made as that motion denied the right to elect. After the plaintiff filed its amended petition setting up the fact that the Interstate Commerce Commission had condemned the rates and had awarded reparation for the difference between the rates charged and the rates found to be reasonable, the defendant made a motion to strike certain allegations from the amended petition, but it did not include in that motion the allegations relating to the willful and malicious publication and maintenance of unreasonable rates (Rec., p. 30). The defendant then filed a general demurrer, but that demurrer under the Kentucky practice raised only the question as to the sufficiency of the

petition as a whole (Civil Code of Practice, secs. 92, 93), and it has never at any time been contended by counsel for defendant that the petition as a whole did not state a good cause of action.

Not only did defendant fail to rely in any way upon the pendency of the proceeding before the Interstate Commerce Commission or upon the order of reparation made by the Commission as a defense, but it clearly indicated its intention not to do so, not only by the special demurrer to the original petition, but by motions made during the trial.

We ask the attention of the court to defendant's "motions to exclude testimony" offered at the close of plaintiff's testimony. By these motions the defendant asked that all testimony as to the charging of unreasonable rates and the damages resulting therefrom be excluded from the jury because the sole right and jurisdiction to determine the reasonableness of the rates and the amount of damage done to a shipper by reason of the charging of an unreasonable rate was in the Interstate Commerce Commission (Rec., pp. 176-177). There was no suggestion in that motion that the jurisdiction of the Interstate Commerce Commission had been exhausted, but rather an invitation to plaintiff to go to the Commission for additional damages, thus clearly waiving any claim that there could be no further recovery because the Commission had already awarded to plaintiff all the damages to which it was entitled.

We also ask the attention of the court to the following excerpt from the bill of exceptions as to the instructions offered by defendant (Rec., pp. 57-58):

"Defendant also moved the court to give to the jury the following instructions, and at the same time made to the court the following statements with reference thereto, to wit:

"(1). The court instructs the jury that it cannot in this action allow any damages to plaintiff on account of defendant having charged to and collected from plaintiff unreasonable rates of freight for the

carriage of interstate shipments of cross-ties. (And at the time defendant offered this instruction No. 1 it said to the court in writing: "In offering this instruction defendant relies upon the Federal Act to Regulate Commerce, approved February 4, 1887, and the various amendments thereof, and insists that this court has no jurisdiction to consider or determine whether or not the rate on an interstate shipment is unreasonable, and if so what damage the shipper has been caused thereby, unless and until the questions of the unreasonableness of the rate and of the amount of the damage have been by court submitted to and heard and determined by the Interstate Commerce Commission.")

"(2). The jury are instructed that they cannot allow plaintiff as damages anything on account of the fact that defendant charged to and collected from it the rate upon the 5th-class freight for the shipment of cross-ties involved in the action of Ohio Valley Tie Company *vs.* L. & N. R. R. Co. in the Jefferson Circuit Court, wherein judgment was given in favor of plaintiff and which judgment was appealed to the Court of Appeals, and which case was afterwards carried to the Supreme Court of the United States, where it is now pending. (And at the time the defendant offered this instruction No. 2, it said to the court in writing: "In moving the court to give the jury this instruction defendant relies upon the Federal Act to Regulate Commerce, approved February 4, 1887, and by amendments thereof, and insists that it is shown both by the record in the action referred to and in the present action that the shipments of cross-ties referred to in that action were interstate shipments, and that the question of the unreasonableness of the rates therein involved had never been submitted to the Interstate Commerce Commission, nor determined by it. And that this court has no jurisdiction to determine the question of the reasonableness of said rates, nor the question of the damages, if any, resulting from charging the same. And defendant also insists that plaintiff having recovered judgment on account of the charges of rates involved in that action, cannot further recover any additional sum herein, based on the same alleged wrongful acts.")"

Nothing could show more clearly that the defendant never at any time relied or intended to rely in the trial court on the fact that plaintiff had elected to claim all its damages in the proceeding before the Interstate Commerce Commission or on the fact that damages had been awarded by the Commission and paid. This is shown not only by the fact that defendant insisted that the court could not award the damages sought in this action "unless and until" the amount of the damage had been submitted by court to and determined by the Interstate Commerce Commission, but by the fact that the defendant did insist that the judgment recovered in the State court was a bar to the damages sought on account of the rates involved in the action in which that judgment was rendered.

This court is not concerned with the sufficiency of the evidence to support the verdict or as to whether or not the damages are excessive, but the review of the evidence in the opinion of the trial judge (Rec., p. 48) and also in the opinion of the Court of Appeals of Kentucky (Rec., p. 208) makes it clear that the acts complained of were willfully and maliciously done for the purpose of destroying plaintiff's business, and that the damages awarded were not excessive. Not only the wrongful acts alleged, but the bad motive, were either shown by undisputed testimony or virtually admitted. The admission of Milton H. Smith, president of defendant company, that the rates were purposely made and maintained at a high level in order that the ties might move out slowly, if at all (Rec., p. 155), shows the bad motive in all that was done. But without that admission the fact that defendant not only refused or delayed to furnish its own cars to move plaintiff's ties, but refused to accept the cars of other carriers when tendered for that purpose (Rec., p. 82), shows conclusively the malice found by the jury to exist. These facts are important as showing how essentially different were the wrongs complained of in this action and the damages recovered on that account from the mere taking

from plaintiff of the excess over a reasonable rate, and the claim for the return of the money thus wrongfully taken, which was asserted in the proceeding before the Interstate Commerce Commission. The essential difference between the two proceedings and the wrongs upon which they were based is further emphasized by the action of the trial court upon the first motion made by defendant in the case. By that motion the defendant sought to require the plaintiff to paragraph its petition and to state as a separate cause of action each of the willful and malicious acts alleged in the petition and the injury resulting therefrom. The trial court overruled the motion upon the ground that the various willful and malicious acts alleged, with the injury to business and property resulting therefrom, constituted jointly a single cause of action which was not severable (Rec., pp. 13-14). That action of the trial court was not relied upon as error in the Court of Appeals of Kentucky, and is not assigned as error here, although the Court of Appeals did hold that the various willful and malicious acts alleged jointly constituted a single cause of action.

An important element of damage was the injury to plaintiff's credit which resulted from the persistent effort of defendant to destroy its business, and the existence of that element of damage illustrates the futility of attempting to apportion to each of defendant's malicious acts the injury which resulted from that act.

Of the record in the proceeding before the Commission only the report and order of the Commission are a part of this record. It may be that if that record were here it would show a waiver or estoppel in addition to that shown by this record. What claims for damages may have been asserted, and denied upon the ground that the Commission did not have jurisdiction, the court does not know. The defendant gave no hint at any time during the progress of the case in the trial court that it was relying upon an election by plaintiff to claim all its damages before the Commission,

but expressly denied any right of election and thus gave plaintiff no opportunity to plead any waiver or estoppel which may have existed.

The assignments of error are twelve in number, but they may be reduced to six propositions:

(1) That it was error to award damages for the same wrongs for which the Interstate Commerce Commission had awarded damages; (2) that the court erred in holding that defendant, by failing to file a plea in abatement, waived its right to claim that plaintiff elected to demand all its damages in the proceeding before the Commission; (3) that the court erred in holding that the Jefferson Circuit Court had jurisdiction of this action in so far as plaintiff seeks to recover damages on account of a violation of the Federal Act to Regulate Commerce; (4) that the court erred in approving the refusal of the trial court to instruct the jury that it could not in this action allow any damages to plaintiff on account of defendant having charged to and collected from plaintiff unreasonable rates of freight for the carriage of interstate shipments of cross-ties; (5) that it was error to approve the refusal of the trial court to instruct the jury that it would have been a violation of the Federal Act to Regulate Commerce for defendant to collect less than the published rate; (6) that the approval of instructions to the jury authorizing a recovery because of defendant's refusal to permit its cars to leave its line deprived defendant of its property without due process of law.

Some of the assignments of error present no Federal question, and the other assignments are so lacking in merit that the Federal questions which they do present are frivolous.

ARGUMENT.

I.

This court will not review the judgment of a State court based upon two or more independent grounds, if any one of those grounds does not involve a Federal question, even though one of the grounds may involve such a Federal question and that question may have been decided adversely to the plaintiff in error.

Murdock vs. Memphis, 87 U. S., 590.

De Saussure vs. Gaillard, 127 U. S., 216.

Beaupre vs. Noyes, 138 U. S., 397.

Harrison vs. Morton, 171 U. S., 38.

II.

The decision of a State court that the plaintiff in error has waived a right claimed under a Federal statute either by some act or omission prior to the litigation or by failing to assert the right in the pending action at the time or in the manner prescribed by established State practice is an independent non-federal ground sufficient to support the judgment of the State court.

Brown vs. Massachusetts, 144 U. S., 573.

Eustis vs. Bolles, 150 U. S., 361.

Moran vs. Horsky, 178 U. S., 205.

Layton vs. Missouri, 187 U. S., 356.

Rogers vs. Jones, 214 U. S., 196, 204.

Louisville & Nashville R. Co. vs. Woodford, 234 U. S., 46.

III.

The decision of the State court in this case that the right claimed under the Federal statute was waived by the

failure to file a plea in abatement, which was an independent non-federal ground, was in line with the established practice both in Kentucky and in other jurisdictions.

Civil Code of Practice of Kentucky, secs. 92, 93.

Louisville & Nashville R. Co. *vs.* Louisville Bridge Co., 116 Ky., 258, 268.

Gillen *vs.* Illinois Central R. Co., 137 Ky., 375.

Stevens *vs.* Bank, 111 U. S., 197.

New Orleans *vs.* Gaines, 138 U. S., 595, 614.

Southern Pac. Co. *vs.* United States, 186 Fed., 737.

McDonald *vs.* Tison, 94 Ga., 549.

Fox *vs.* Althorp, 40 Ohio St., 322.

In Louisville & Nashville R. Co. *vs.* Louisville Bridge Co., *supra* (p. 268), the court said:

"If objection had been made to the separation of the cause of action, the plaintiff might have dismissed one suit without prejudice, and set up the entire cause of action in the other.

IV.

Not only did defendant waive its right to claim an election by plaintiff by failing to file a plea in abatement, but it affirmatively indicated its intention not to rely upon the order of reparation as a bar by the reasons it gave for its motion to exclude testimony (Rec., pp. 176-177), and also for requesting that the jury be instructed not to consider the charging of unreasonable rates as an element of damage (Rec., pp. 57-58).

The claim that under the Act to Regulate Commerce plaintiff could not maintain the action "unless and until" the amount of the damages had been submitted by court to the Interstate Commerce Commission and determined by that tribunal, was clearly a waiver of any right to require an election or to claim that an election had been made as it

was an invitation to the court to submit the question of damages to the Interstate Commerce Commission and therefore an admission that the jurisdiction of the Commission had not been exhausted.

V.

The decision that the alleged right under a Federal statute was waived is based on a local question of pleading and practice not reviewable by this court.

Delaware City S. & P. S. B. Nav. Co. *vs.* Reybold,
142 U. S., 636.

Tripp *vs.* Santa Rosa Street Railway Co., 144 U. S.,
126.

Western Union Telegraph Co. *vs.* Wilson, 213 U. S.,
52.

Texas & Mo. Railway Co. *vs.* Miller, 221 U. S., 408.

Brinkmeier *vs.* Missouri Pacific Railway, 224 U. S.,
268.

VI.

The provision of section 9 of the Act to Regulate Commerce which requires a shipper to elect whether he will prosecute his claim for damages for a violation of the act before the Interstate Commerce Commission or before a Federal court has no application where the shipper has a common-law right of action preserved to him by section 22 of the act which he may prosecute in a State court after the rate has been condemned by the Commission.

Texas & Pacific Ry. Co. *vs.* Abilene Cotton Oil Co.,
204 U. S., 426.

Mitchell Coal Co. *vs.* Pennsylvania Railroad Co., 230
U. S., 247.

VII.

The mere filing of a claim for reparation before the Interstate Commerce Commission was not an election to claim all of plaintiff's damages before that tribunal.

Brady vs. Daly, 175 U. S., 148.

Rankin vs. Tygard, 198 Fed., 795.

That being true, the order of reparation, even if it be regarded as a judgment, is not available as a defense, not being pleaded in bar, and the record not being produced.

United States vs. Bliss, 172 U. S., 321.

VIII.

It would be most unreasonable to hold and it is, therefore, frivolous to contend that under section 9 of the Act to Regulate Commerce a shipper who is compelled to go to the Interstate Commerce Commission to have an unreasonable rate condemned may not accept from the Commission an order requiring the carrier to pay back to him the money wrongfully taken from him without thereby depriving himself of the right to go to the courts to recover general damages, as the courts are better prepared in all cases to give such damages, and they alone have power to give such damages where the damages have resulted from a combination of acts which together constitute a single cause of action, and the Commission has jurisdiction of only one of such acts. The Interstate Commerce Commission had refused to take jurisdiction of claims for general damages, (*Joynes vs. Pa. R. R. Co.*, 17 I. C. C., 361), and some of the courts had held that the courts did not have jurisdiction of a claim against the carrier for the money wrongfully taken until the Commission had ordered it to be paid back to the shipper (*Darnell vs. Illinois Central R. R.*, 225 U. S., 243), and that being

true the only safe course to pursue was to go to the Commission for reparation and to the courts for general or extraordinary damages, and the plaintiff cannot be deemed, therefore, to have elected to claim all its damages before the Commission because it asked the Commission to order the repayment of the money which the carrier had wrongfully taken, there being no question of jurisdiction. Election is a matter of intention in such a case.

Madden vs. Louisville, N. O. & T. Ry. Co., 66 Miss., 258.

It is proper to state that a majority of the Commission as now constituted has recently held that the Commission should take jurisdiction of a claim for general damages.

Vulcan Coal & Mining Co. vs. I. C. R. R. Co., 33 I. C. C., 52.

IX.

As the defendant failed to ask the court, either by plea in abatement or by motion, to require the plaintiff to elect, the two remedies cannot be regarded as inconsistent, and, therefore, plaintiff had the right to prosecute both remedies, subject to the limitation that it could have but one satisfaction for the same injuries.

Barth vs. Loeffelholz, 108 Wis., 562.

Here, however, the injuries are not the same, although they may arise in part from the same acts, and there was, besides, no allegation that the award made by the Commission had been satisfied.

X.

The rule that the prosecution to judgment of an action for part of an indivisible demand is a bar to an action to recover the remainder of the demand, even if there had been

a plea in abatement and the order of the Commission had been pleaded in bar, would have no application here because:

First. The demand was not an indivisible one, and that part of the demand here sued on had not accrued when the claim was filed before the Commission.

Cross *vs.* United States, 14 Wall., 479.

Deweese *vs.* Smith, 106 Fed., 438.

As the finding of the State court that the damages awarded in this action accrued after the proceeding before the Interstate Commerce Commission was instituted is not assigned as error, and being a finding of fact could not be reviewed even if it were so assigned, it must be accepted as correct, this court having no jurisdiction of questions of fact or of local law which are merely preliminary to or the possible basis of a Federal question, where no attempt to avoid the Federal question is apparent.

Henderson Bridge Co. *vs.* Henderson City, 141 U. S., 679.

Eustis *vs.* Bolles, 150 U. S. 361.

Dower *vs.* Richards, 151 U. S., 658.

Israel *vs.* Arthur, 152 U. S., 355.

Telluride Power Co. *vs.* Rio Grande Western Ry. Co., 175 U. S., 639.

Telluride Power Co. *vs.* Rio Grande Western Ry. Co., 187 U. S., 569.

Vandalia Railroad *vs.* South Bend, 207 U. S., 359.

Second. The order of the Interstate Commerce Commission was merely *prima facie* evidence and was not a judgment.

Meeker *vs.* Lehigh Valley R. R. Co., 236 U. S., 412, opinion by Mr. Justice Van Devanter, February 23, 1915.

Third. The demand upon which this action is based arose out of a combination of acts which were bound together by a common malicious purpose to injure plaintiff's business, and it is so well settled that such a combination of acts creates a cause of action separate and distinct from that created by any of the separate acts that the contention to the contrary is so lacking in merit as to be frivolous.

Standard Oil Co. *vs.* Doyle, 118 Ky., 662.

Boyce *vs.* Odell Commission Co., 107 Fed., 58.

Jones *vs.* Morrison (Minn.), 16 N. W., 854.

Oliver *vs.* Perkins, 92 Mich., 304.

Fourth. The purpose of the proceeding before the Commission was, in effect, to recover that which had been wrongfully taken, while this action was brought to recover damages resulting from that wrongful taking in connection with other acts, and therefore the two claims were so different in their nature that the recovery of the one kind of damages was not a bar to the recovery of the other kind. And this would be true even if the willful and malicious maintenance of the rates were the only ground of action.

Analogous authorities:

Walker *vs.* Mitchell, 18 B. Mon., 541.

Woods *vs.* Finnell, 13 Bush. (Ky.), 628.

Bramlette *vs.* Louisville & Nashville R. Co., 113 Ky., 300.

Bramlette *vs.* Louisville & Nashville R. Co., 24 Ky. Law Rep., 976.

Louisville Gas Co. *vs.* Ky. Heating Co., 132 Ky., 435.

Crockett *vs.* Miller, 112 Fed., 729.

Hensen *vs.* Taylor, 108 Ga., 367.

XI.

Even if the court might hold, without a plea in abatement or a plea in bar, that there was an election by plaintiff to claim all its damages in the proceeding before the Commis-

sion, if all the record in that proceeding were here, there is no merit in the claim that it may do so in the absence of the record, as that record might show some element of waiver or estoppel.

United States *vs.* Bliss, 172 U. S., 321.

Jourolman *vs.* Massengill, 86 Tenn., 81.

It does affirmatively appear that plaintiff asked the Commission to award to it the difference in the two rates, and there is no room for the assumption that it asked general or consequential damages. In this case the court expressly instructed the jury not to find for plaintiff anything on account of the difference between the rate charged and the rate found to be reasonable (Rec., p. 60).

XII.

The first, second and third assignments of error are based upon the assumption that the State court decided that the wrongs for which a recovery was permitted in this case are the same wrongs on account of which reparation was awarded by the Interstate Commerce Commission, whereas the court decided that the wrongs were not the same, and that decision, not being assigned as error, cannot be reviewed.

XIII.

The claim made by the eighth assignment of error that the Jefferson Circuit Court had no jurisdiction of this action is wholly without merit, because:

First. No objection to the jurisdiction was ever made except by the second paragraph of the special demurrer to the original petition, and that objection was based solely on the ground that the Interstate Commerce Commission alone had jurisdiction to the extent that the claim for damages was based on the charging of unreasonable rates by defendant. Besides, the objection was sustained upon the ground that the Commission must first find the rates to be unreasonable

before a right of action could be based on the fact that they were willfully and maliciously published, and was not renewed after the amended petition was filed setting up the fact that the rates had been condemned by the Interstate Commerce Commission. The State court had jurisdiction of the subject-matter under section 16 of the Act to Regulate Commerce, even though the action be regarded as one for a violation of that act, and any right to object to the jurisdiction merely because the Interstate Commerce Commission had not ascertained the damages was waived by failure to make the objection at the proper time.

Darnell vs. Illinois Central R. R., 225 U. S., 243.

Second. The question was not decided by the State Court.

Third. The action was a common-law action, and, as all common-law remedies were preserved by section 22, the State court had jurisdiction notwithstanding section 9 and without the aid of section 16.

Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S., 426.

Robinson vs. Baltimore & Ohio R. Co., 222 U. S., 506.

Each of the cases cited was an action brought in a State court, and the only reason that court was denied jurisdiction was that the Interstate Commerce Commission had not condemned the rate or the practice complained of.

Fourth. The State courts have jurisdiction of actions for violations of Federal statutes unless the statute provides otherwise.

Western Union Tel. Co. vs. Call Publishing Co., 181 U. S., 92, 102.

Missouri Pac. Ry. Co. vs. Larabee Flour Mills Co., 211 U. S., 612.

Galveston, H. & S. A. Ry. Co. vs. Wallace, 223 U. S., 481.

Missouri, K. & T. R. Co. vs. Harris, 234 U. S., 415.

Fifth. The declaration by defendant in requesting instructions that the court itself should ask the Commission to ascertain the damages (Rec., pp. 58-59) was an admission of jurisdiction.

XIV.

The ninth assignment of error to the effect that the State court erred in approving the refusal of an instruction to the jury not to allow any damages to plaintiff on account of defendant having charged to and collected from plaintiff unreasonable rates has no merit, because:

First. The only Federal question which the assignment presents is that which was declared when the instruction was offered (Rec., pp. 57-58), and that is based upon the ground that the court had no jurisdiction under the Act to Regulate Commerce to consider or determine what damage the shipper had suffered from the charging of an unreasonable rate "unless and until" the amount of the damage had been submitted by court to and determined by the Interstate Commerce Commission, which contention was abandoned in the Court of Appeals of Kentucky by the substitution therefor of the contention that defendant was entitled to the instruction because plaintiff had no right to go to either the Commission or the courts for additional damages on account of the charging of unreasonable rates. The ground on which this instruction was asked being abandoned in the Court of Appeals, the Federal question involved was never presented to or decided by that court, and cannot, therefore, be reviewed by this court.

Second. In the absence of any express decision of the question by the State court, it must be assumed that the court concluded, as it had the right to do, that the question had been abandoned or that the court was of opinion that the objection came too late, no motion having been made to

strike from the petition the allegations relating to the charging of unreasonable rates and no objection having been made to the testimony offered on that subject.

Cox vs. Texas, 202 U. S., 446.

Third. The mere condemnation of the rates by the Commission was sufficient to authorize the consideration of the willful and malicious maintenance and charging of the rates as an element of damage.

Mitchell Coal Co. vs. Pennsylvania R. Co., 230 U. S., 247.

Phillips Co. vs. Grand Trunk Western Ry. Co., opinion by Mr. Justice Lamar, March 15, 1915.

Fourth. In no event did the court have authority to submit any question to the Interstate Commerce Commission.

XV.

As the questions raised by the 10th, 11th and 12th assignments of error were neither presented to the State court nor referred to by that court in its opinion, it must be assumed that the court found that the alleged errors, if any, in giving and refusing instructions were not prejudicial or that the alleged errors were not properly presented for review.

Cox vs. Texas, 202 U. S., 446.

Under a State practice like that of Kentucky, which authorizes a reversal only for errors prejudicial to the substantial rights of the party appealing (Civil Code of Practice, secs. 134, 338, 756), it would be unreasonable to require this court in an action involving many elements of damage to scan the record closely to ascertain whether or not an error in giving or refusing an instruction relating to only one of these elements of damage was prejudicial where the plaintiff in error failed to present the question to the State court, and it was not decided by that court.

Besides, the defendant by its petition for rehearing under the caption "The Federal Question" referred to the question of election of remedies alone, thus showing that it did not intend to rely on any other Federal question.

XVI.

The claim that the court erred in approving the refusal of the trial court to instruct the jury that it would have been a violation of the Act to Regulate Commerce for defendant to collect less than the published tariff rates is so lacking in merit as to be frivolous in view of the fact that defendant could not profit by its own wrong in publishing the rates willfully and maliciously knowing them to be unreasonable. Defendant knew when it published the tariff naming those rates that it could not, while that tariff remained in effect, be prohibited from collecting the rates named therein, and as it maliciously intended to inflict whatever injury might result from that fact, and thus abused the process granted by the statute for the collection of rates, it cannot rely upon that fact as exempting it from liability.

Analogous authority:

Woods vs. Finnell, 13 Bush. (Ky.), 628.

XVII.

The trial court did not instruct the jury that any duty rested upon defendant to permit its cars to go off its line, but merely that defendant had no right to willfully and maliciously discriminate against plaintiff in that respect, and that this did not operate as a taking of property without due process of law is so well settled that the questions raised by the 11th and 12th assignments of error must be regarded as frivolous.

Missouri Pacific Ry. Co. vs. Larabee Flour Mills Co.,
211 U. S., 612.

Pennsylvania Company vs. United States, 236 U. S.,
351, opinion by Mr. Justice Day, February 23,
1915.

XVIII.

As plaintiff's right of action is not based on a Federal statute, the questions presented do not involve the right of defendant to be shielded from liability under such a statute, although the questions may incidentally involve the construction of such a statute. Therefore, this court has no power to consider the questions, as the case comes here from a State court.

Kizer vs. Texarkana & Fort Smith Ry. Co., 179 U. S., 199.

St. Louis & Iron Mountain Ry. Co. vs. McWhirter, 229 U. S., 265, 275.

Seaboard Air Line Ry. vs. Duvall, 225 U. S., 477.

Seaboard Air Line Ry. vs. Padgett, 236 U. S.—decided March 22, 1915.

Conclusion.

We submit that the assignment of errors does not raise a single Federal question which has any merit whatever, and that, without regard to whether or not the questions were waived by the failure to present them in the trial court at the proper time and in the proper way, the writ of error must be dismissed or the judgment affirmed because the questions are frivolous.

Respectfully submitted,

JOHN BRYCE BASKIN,
EDWARD W. HINES,
J. V. NORMAN,
Counsel for Defendant in Error.



LOUISVILLE & NASHVILLE RAILROAD COMPANY
v. OHIO VALLEY TIE COMPANY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF
KENTUCKY.

No. 66. Argued November 3, 6, 1916.—Decided December 18, 1916.

Under §§ 8, 9 and 16 of the Act to Regulate Commerce, all damages properly attributable to the exaction of excessive rates by carriers in interstate commerce may be awarded in a proceeding before the Interstate Commerce Commission; and, when damages because of such rates have been so awarded, and satisfied, further damages resulting from the same cause may not be recovered through independent proceedings in court.

161 Kentucky, 212, reversed.

THE case is stated in the opinion.

Mr. Helm Bruce, with whom *Mr. Henry L. Stone* was on the briefs, for plaintiff in error.

Mr. Edward W. Hines and *Mr. John Bryce Baskin*, with whom *Mr. J. V. Norman* was on the briefs, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought by the defendant in error in 1911 against the Railroad Company to recover for injury to business and other damages alleged to have been caused by the Railroad's acts. The most important feature at this stage is that the Railroad maintained and collected a higher rate for cross-ties than it did for lumber when they were carried between States, although the state commission required the same rate upon both for carriage within the State, and although, as the Railroad knew, the Interstate Commerce Commission repeatedly had decided that the rates for cross-ties and lumber should be the same. It is alleged that these and the other acts complained of were done for the purpose of getting rid of the plaintiff as a competitive buyer, and, in that sense, maliciously. The plaintiff tried to meet the higher rate by directing delivery within the State of ties intended to go beyond, which attempt the defendant encountered by refusal to carry them except on its interstate tariff, and hampered the plaintiff by declining to let its cars leave its road, by deliveries at points requiring a haul by wagon and so forth, and, in short, it may be assumed that the Railroad did other acts to further the alleged end, not necessary to be stated here.

Shortly before bringing this suit the plaintiff complained to the Interstate Commerce Commission in respect of charges collected upon ninety-one carloads of ties, and in 1912 obtained an order that the Railroad pay to it \$6198 as reparation for unreasonable rates, and establish a rate for ties not to exceed its contemporaneous one for lumber of the same kind of wood. This order was pleaded by an amendment to the petition and it appeared at the trial that the sum awarded had been paid. As the damage alleged was attributed mainly to the publication and exaction of excessive charges, the defendant insisted at

the trial and before the Court of Appeals upon its rights under the Act to Regulate Commerce, and those rights were passed upon by the court, so that there is no doubt of the jurisdiction here, although some questions were raised that we think it unnecessary to discuss.

The defendant contended and asked for a ruling that in this action no damages could be allowed "on account of defendant having charged to and collected from plaintiff unreasonable rates of freight for the carriage of interstate shipments of cross-ties" and other rulings to similar effect. It also asked an instruction that under the Act to Regulate Commerce it was required to collect the rates fixed by its tariff on file and in effect. These requests were refused, and the jury were told that if they believed that the rates found by the Interstate Commerce Commission to be unreasonable were wilfully and maliciously maintained with intent to injure the plaintiff's business, and that the defendant knew them to be unreasonable, and that by its acts it tied up a part of the plaintiff's capital, and so damaged the plaintiff's business, then upon this, as well as on several other possible findings stated, they would find for the plaintiff. The jury found a verdict for the plaintiff for certain itemized expenses and for \$50,000 damage to plaintiff's business and credit as mentioned in the above instruction. Judgment on the verdict was affirmed by the Court of Appeals. 161 Kentucky, 212.

The Court of Appeals decided that the Act to Regulate Commerce committed to the Interstate Commerce Commission only the granting of special relief against the making of an overcharge and that the satisfaction of the Commission's award still left open an action in the state courts to recover what are termed general damages—such as are supposed to have been recovered in this case. In this we are of opinion that the court was wrong.

By § 8 a common carrier violating the commands of the act is made liable to the person injured thereby "for the

full amount of damages sustained in consequence" of the violation. By § 9 any person so injured may make complaint to the Commission or may sue in a court of the United States to recover the damages for which the carrier is liable under the act, but must elect in each case which of the two methods of procedure he will adopt. The rule of damages in one hardly can be different from that proper for the other. An award directing the carrier to pay to the complainant the sum to which he is entitled is provided for by § 16. By the same section if the carrier does not comply in due time with the order the complainant may sue in a state court—which implies that if the order has been complied with and the money paid no suit can be maintained. It is to be noticed further that reparation before answer is contemplated as possible by § 13 and in that case the carrier shall be relieved of liability to the complainant though only of course for the particular violation of law. The decisions say that whatever the damages were they could be recovered; *Pennsylvania R. R. Co. v. International Coal Mining Co.*, 230 U. S. 184, 202, 203; *Meeker v. Lehigh Valley R. R. Co.*, 236 U. S. 412, 429; and that the statute determines the extent of damages. *Pennsylvania R. R. Co. v. Clark Brothers Coal Mining Co.*, 238 U. S. 456, 472. We are of opinion that all damage that properly can be attributed to an overcharge, whether it be the keeping of the plaintiff out of its money, dwelt upon by the trial court, or the damage to its business following as a remoter result of the same cause, must be taken to have been considered in the award of the Commission and compensated when that award was paid.

If at a new trial the plaintiff can prove that the defendant unjustifiably refused cars or caused it other damage not attributable to the overcharge of freight, our decision does not prevent a recovery; but it is evident that the present judgment embraces elements that cannot be allowed.

Judgment reversed.